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THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW

*A thesis submitted in partial fulfillment of the requirements
for the degree of Doctor of Philosophy in the Faculty
of Political Science, Columbia University*

By
CLYDE EAGLETON
B. A. (OXON.), M. A.



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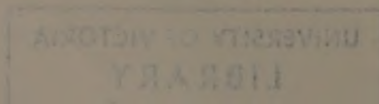
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TO THE LITTLE LADY

PREFACE

STATES, like individuals, have ever been concerned with their rights rather than with their duties. It is nevertheless surprising that so little attention has been given to the subject of the responsibility of states in international law. Only in this century have efforts been made to give it a detached treatment; and there have appeared only two or three monographs (none of these in English) which may be said to attack the problem directly, though the exhaustive work of Professor Borchard is a mine of information upon the subject.

No complete treatise has yet appeared; and certainly this small volume lays no claim to such a title. It is merely an introductory survey of a subject which would require a lifetime of study; and it is issued in the hope of initiating the discussion which such a subject deserves. I have attempted to derive from existing international practice the rules which govern the responsibility of states, and to systematize them somewhat, especially with regard to differentiating substantive and procedural rules. I have also been concerned, to a slight degree, with the broader aspects of the subject—its base, its needs, its tendencies. In other words, I have approached it not only from the viewpoint of the lawyer, but also from that of the legislator.

I hope therefore that it may be of service not only to the lawyer who has international claims to prepare, or who is interested in the important work of the codification of international law, but of even more service to all those who are interested in the problem of international government. After all, the basis of any governmental system is obligation; and since political institutions are evolutionary, rather than *de novo* creations, the proper approach to the problem of maintaining international peace and justice must be from the existing system. Far too many thoughtless schemes, set up with no reference to existing foundations, now clog the path of international progress. While this study is necessarily technical in character, it is hoped that it will not be too much so for the serious student of international government.

The work was initiated some years ago in a seminar at Columbia University, under Professor John Bassett Moore, now Judge Moore of the Permanent Court of International Justice. To the remarkable combination of erudition and common sense which Judge Moore represents I owe such understanding as I may have of the character of international law. My chief debt is to Professor Charles Cheney Hyde, formerly Solicitor of the Department of State, and now Hamilton Fish Professor of International Law and Diplomacy at Columbia University. His knowledge of the practical application of the rules of responsibility has given realism to my understanding of them; and his generous encouragement and meticulous criticism have been the source of most of what is good in this work. At Columbia also, Professors J. P. Chamberlain, Julius Goebel, Jr., Philip C. Jessup, and H. E. Yntema, the last-named my friend and former classmate at Oxford, have given me many important suggestions. The manuscript has been read also by Professor Quincy Wright, of the University of Chicago, and by Professor J. W. Garner, of the University of Illinois; and I have talked over many individual problems with other authorities, including members of the Secretariat of the League of Nations, who prefer that their names be left unmentioned. It is obvious that I must credit these generous friends with whatever value the book may have. Their keen criticisms and thorough knowledge of international law have eliminated many errors; and of others which will be pointed out they will doubtless be able to say, "I told you so!" To the courtesy of Mr. C. Van Vollenhoven, Presiding Commissioner of the General Claims Commission, United States and Mexico, I owe the opportunity of including up to date the very important decisions which that Commission has issued—decisions which have done much in clarifying and extending the principles of state responsibility. To all these I offer my sincere gratitude, and the hope that they will not be too disappointed in the final result.

In view of the increasing importance of the subject to students of international law, and in view of the attempts at codification now being made, I have included as appendices the projects for a code of the laws of responsibility offered by the Committee of Experts (for the League of Nations) for the Progressive Codification of International Law; those of the American Institute of

International Law; and the Resolutions adopted by the *Institut de Droit International* in its 1927 meeting at Lausanne. I regret that the last named Resolutions became available too late to receive the serious study which they deserve; but I have been able to insert into the proofs a number of references to them, as printed in Appendix III.

For the benefit of the practicing lawyer, the Instructions to Claimants issued by the Department of State of the United States have been included as Appendix IV.

CLYDE EAGLETON

New York University,
Washington Square College,
November 11, 1927.

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Attention is called to the following abbreviations used in the Table, which might not be readily recognized: "Opinions," for *Opinions of Commissioners*, Claims Commission, United States and Mexico, Washington, 1927; "Decisions," for *Administrative Decisions and Opinions of a General Nature*, Mixed Claims Commission, United States and Germany; "Nielsen," for *Report of Fred K. Nielsen*, American and British Claims Arbitration, Washington, 1926; "T. A. M.," for the *Tribunaux Arbitraux Mixtes*; "Ralston," for his *Venezuelan Arbitrations of 1903*.

Dates given for cases from Moore's Arbitrations and from Ralston are usually the dates of the treaties under which the Commissions were established. References to decisions of the General Claims Commission, United States and Mexico, are in this Table made to the consolidated edition, which had not appeared in time to be cited in footnote references throughout the text.

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THE RESPONSIBILITY OF STATES
IN INTERNATIONAL LAW

CHAPTER I

HISTORICAL AND LEGAL BACKGROUND

§ 1. The study of the responsibility of states in international law involves an examination of the theory upon which reparation may be demanded by one state of another, and of the processes by which it may be obtained. The members of the community of nations have, in practice, agreed to respect certain principles for their mutual guidance; and, in so doing, it has been understood that they were thereby accepting obligations to observe the conduct prescribed. The failure to meet these obligations imposes upon the guilty state the further obligation to make reparation for the injury caused; and, in practice, states are every day called upon for such reparation.

If one inquires as to the origin of obligation in jurisprudence, he is forced back to moral axioms. "The conception of liability," says Street, "is founded upon an axiomatic principle."¹ It is manifest that at some point one must cease asking why, and accept a principle, if not as an axiom, at least as an hypothesis upon which to build. Human society has long recognized certain rights as accruing to its members—rights which prescribe correlative duties on the part of others. *Hodie mihi, cras tibi*. Obligation, simply put, is the owing of a duty; and, behind it, claiming the performance of that duty, is responsibility.²

¹ Thomas Street, *The Foundations of Legal Liability*, (Northport, New York, 1906), I, p. 67.

² The responsibility of states in international law is essentially different from that of individuals under private law. Granted the supremacy of the state over individuals within it, it is obvious that no one person could maintain toward another the same relationship which the state alone is authorized to maintain toward individuals. The systems of law which govern the two relationships are different in theory and in practice; and it would be dangerous to draw analogies between responsibility, as it has developed into a rule of law between states, and the liability, in private law, of one citizen toward another. The word "responsibility" will, therefore, be employed throughout this work, in order to differentiate the concept from the "liability" of private law. See Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen*, *Zeitschrift für Völkerrecht*, Band X, Ergänzungsheft 2, 1917, p. 124; Benjamin, *Haftung des Staates aus dem Verschulden seiner Organe nach Völkerrecht* (Heidelberg, 1909), p. 13; Decencière-Ferrandière, *La responsabilité internationale*

It has been necessary to incorporate certain of these rights and duties into law, and thus to establish them as juridical obligations, expressing the will of the community through the power of the state. The necessity of rules to govern human intercourse has long been recognized. Upon it, the state has been built, with its law; without it, liberty would not exist—a well-understood paradox. The gregarious instinct in man, and an interdependence between human beings constantly increasing with the development of an intricate civilization, have produced a tacit agreement that certain duties may be enforced by state action, in order that a legal equality of rights may be attained; for individuals have not yet reached that ideal status in which each shall be able to count upon equality of right without the necessity of restraint upon rivals. The individual must, therefore, submit to the enforcement of rules by the collective action of this organized political group. Nor is this a matter of choice upon his part: if he is permitted any choice at all, it is not that he may disregard the will of his group in any or all of its rules, but only that he may perhaps be allowed a vote as to which rule he may prefer to have adopted. If he desires the community to respect his rights, it is only on condition that he respect the rights of others; and thus legal rights have appeared, entailing corresponding duties which limit his theoretical freedom of action. The law which imposes upon him the obligation of respecting the rights of others, in order that his own rights may be respected, is based upon the common interest of all the members of the political group to which he belongs. If, then, an individual violates a law, he may injure another individual, or perhaps the entire society of which he is a member, with the legal consequence that he is obliged to make reparation—that is, to restore as nearly as possible the condition which he destroyed. A moral obligation is, unfortunately, not sufficient, in the present development of humanity, to protect the rights thus constituted; and it is necessary to enforce the obligations selected for that purpose by the collective action of the group, working through instruments of coercive force, and compelling the individual to submit to the general will ex-

des États à raison des dommages subis par des étrangers (Paris, 1925), p. 32; American and British Claims Arbitration Tribunal, *Report of Fred K. Nielsen* (Washington, 1926), p. 265.

pressed in those rules of conduct known as laws. Obligation, then, in the legal sense, is a necessary instrument of social co-operation, and cannot be denied by individual free will.³

§ 2. Responsibility in international law appears as a result of much the same forces as those above discussed. It derives its authority from the same moral sense of obligation which influences mankind everywhere.⁴ From the moment that the right of the separate and equal existence of states was admitted, it became necessary to set up rules to guard these rights; for states, no more than individuals, can exist to themselves. When sovereign states recognized each other as free and equal, international relations were necessarily based upon a reciprocity of rights and duties. Here, again, certain rules were picked out for enforcement by the community of nations; and, to the accepted norms of international law, states may now be forced to submit. The machinery of enforcement for international law is essentially different from that for private law. Recognizing no common superior, states have mutual consent as the basis for their rules of conduct; and no new rule may be enforced upon a state without its own individual agreement to that rule. Membership in the community of nations, however, presupposes the acceptance of the existent rules of that community; and it is upon this agreement to observe the rules of the community that international responsibility is founded.⁵

³ See R. Demogue, *Traité des obligations en général* (Paris, 1923-1925), I, Chap. I. He quotes the classic definition of Justinian: "Obligatio est juris vinculum quo necessitate astringimur alicui solvendae rei secundum nostra civitatis jura"; but adds as a better modern definition: "quand une personne est tenu envers une autre à donner, faire, ou ne pas faire."

⁴ "The ultimate foundation of international law is an assumption that states possess rights and are subject to duties corresponding to the facts of their postulated nature. In virtue of this assumption . . . it is considered that their moral nature imposes upon them the duties of good faith, of concession of redress for wrongs, of regard for the personal dignity of their fellows, and to a certain extent of sociability," Hall, *International Law* (Eighth Edition, Oxford, 1924), p. 50. "La promesse lie. Cette thèse est un axiome, une vérité primordiale, qui ne peut être déduite d'autres vérités, et qui est reconnue dans le monde du moral comme dans le monde du droit," Redlob, *Histoire des grands principes du droit des gens* (Paris, 1923), p. 19. See also Hyde, *International Law* (Boston, 1922), I, p. 1; Ch. de Visser, "La Responsabilité des États," *Biblioteca Visseriana*, II, p. 90; de Brissot Case, Moore, *History and Digest of the International Arbitrations to which the United States has been a party* (Washington, 1898), p. 2952.

⁵ Fauchille, *Traité de droit international public* (Paris, 1923-1925), I, p. 514; Strupp, *Das völkerrechtliche Delikt* (Stuttgart, 1920), p. 61; Hyde, *International Law*, I, § 1; Oppenheim, *International Law* (Third Edition, London, 1920-1921), I, § 9.

For internationally illegal conduct, then, a member of the community of nations may be held responsible, if such conduct may be fairly chargeable to it. For a long period of time, during the Middle Ages, a state was regarded as responsible for the acts of any of its members; or rather, the group which made up the state were regarded as responsible, individually and collectively, for the injury caused by any one of them.⁶ It is easily conceivable that the tie between the state and the individual might have continued to be regarded as the source of responsibility; but, as a matter of fact, political development pursued a different path. Gradually, the state appeared, as a personality distinct from its members. Upon this entity, whose appearance is usually dated from the Peace of Westphalia, international law conferred rights and duties, with corresponding responsibility. The state was permitted to enjoy practically complete control over its own territories; and the state became the organ through which international law operated upon individuals or territories.

At this point, it may be said, the principle of responsibility leaves behind it the vaguer field of morals and hypotheses, and enters upon the domain laid down for it in practice by positive international law. The exclusive territorial control enjoyed by a state under international law is attended by a corresponding responsibility, which is distinctive of states only. No ordinary person, liable at civil law for damages done by other persons, could wield over them the power which the state has over those within its territories; and he could not, therefore, be held to so great a liability. But the control which the state may exercise is far wider.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.⁷

⁶ Jess, *Politische Handlungen Privater gegen das Ausland und das Völkerrecht*, Abhandlungen aus dem Staats- und Verwaltungsrecht, 37 Heft (Breslau, 1923), pp. 7-14; Decencière-Ferrandière, *Responsabilité*, p. 76.

⁷ *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136, Moore, *Digest of International Law* (Washington, 1906), II, p. 4.

There are, of course, exceptions to the control which the state is granted. State responsibility does not always coincide exactly with territorial limits. Thus, its diplomatic agents abroad, or warships, or armed forces, may violate international law; or the state may fail to carry out a treaty.

It should be noted, too, that the state, having been granted control, is presumed to

This exclusive territorial control, which is a legal possession of the state, logically results in the acceptance by that state of responsibility for illegal acts occurring within the range of its control.⁸ If one nation allows to another a monopoly of jurisdiction within the boundaries of the latter, and thereby excludes itself from the possibility of protecting its own rights therein, this can only be upon the assumption that the latter state makes itself responsible for all internationally illegal acts committed within its control against the former state. The incidence of international law is thus local rather than national. In this understanding, a satisfactory compromise is reached between the control which a state exercises over its subjects wherever they may be, and the control which a state exercises over all persons within its boundaries, whoever they may be. The exclusive territorial jurisdiction of the state, which is a concomitant of its independence, is the chief source of its responsibility.⁹

This principle is conversely illustrated in a recent decision of the Mixed Claims Commission, United States and Germany. The question presented to the Umpire for decision was:

Under the Treaty of Berlin is Germany directly liable for damages

have it, and is responsible for having it. The international standards fixed in this regard, the rule of due diligence, etc., will be discussed in the chapters below.

⁸ "The exclusive force possessed by the will of the independent community within the territory occupied by it is necessarily attended with corresponding responsibility," Hall, *International Law*, § 11.

"As the territorial sovereign is in legal contemplation supreme within its own domain, and supposedly capable of enforcing obedience to its will therein, as well as the sole possessor of the right to deal with foreign affairs, there is imposed upon it the corresponding obligation to do justice, or to exercise what may be called a duty of jurisdiction with respect to matters pertaining to the outside world," Hyde, *International Law*, I, § 266; and see in general his entire discussion of Rights and Duties of Jurisdiction.

See also Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen*, *Zeitschrift für Völkerrecht*, Band X, Ergänzungsheft 2, pp. 39-40; Strupp, *Völkerrechtliche Delikte*, p. 61; Anzilotti, "La responsabilité internationale des États à raison des dommages soufferts par des étrangers," in *Revue générale de droit international public*, XIII, pp. 6, 291; de Visscher, *Responsabilité*, p. 93.

⁹ "The essential feature of international law is not that it lays down rules of conduct for states, but that it holds states responsible for the conduct of persons. . . . The obligations imposed upon states in time of peace are in general derived from one fundamental conception, which may be summarized as the principle of territorial independence or territorial sovereignty. Modern international law was impossible until the idea that government and jurisdiction are inseparable from territory had received recognition," Wright, *The Enforcement of International Law through Municipal Law in the United States* (Urbana, Illinois, 1916), pp. 5, 21.

indirectly suffered by American minority stockholders in German corporations resulting from the acts of the Government of Australia in seizing and retaining the New Guinea properties or the proceeds of such German corporations, at a time when New Guinea had been ceded by Germany and was occupied and governed by Australia?

The Treaty provided for compensation to be made by Germany for injuries done "in German territory as it existed on August 1, 1914"; and upon this clause the claimants took their stand. But the Umpire replied that liability depends not only on the territorial requirements, but upon the government applying the measures in question within the territorial limits.

Why hold Germany liable for the act of Australia in seizing the property of German corporations (including the American interests therein) in territory which had, at the time of the seizure, been formally ceded by Germany and was in the possession and control of Australia, simply because it *had been* German territory and in her possession and control at the beginning of and during the first six weeks of the war, and not at the same time hold Germany liable for the American interests in properties of numerous German corporations seized and liquidated by Great Britain, France and other Allied Powers?

In pursuance of this line of reasoning, the Umpire concluded that, since Germany did not have control over these territories at the time the acts complained of occurred, she could not be held responsible for them.¹⁰ Obviously, a change of sovereign means a change in the responsible person,¹¹ as the rules of state succession show.

But while the responsibility of a state is fundamentally based upon the control which it exercises within its borders, it does not follow that the state may be held responsible for any injury occurring therein. The law of nations does not make the state a guarantor of life and property. It is answerable, under international law, only for those injuries which are internationally illegal in character, and which can be fastened upon the state itself. The

¹⁰ *United States of America on behalf of Paula Wendel and others*, Mixed Claims Commission, United States and Germany, *Administrative Decisions and Opinions of a General Nature*, pp. 772-798. The opinion cites several similar cases, including *The Lewa Rubber Estates Co.*, III, Decisions Mixed Arbitral Tribunals 29; *Brueninger v. Germany*, III, *ibid.*, 20; *Rothblatz v. Germany*, IV, Decisions Mixed Arbitral Tribunals, 747.

¹¹ See the Report of Mr. Olney, December 7, 1896, Moore, *Digest*, I, p. 308; and the summary from Hall, *ibid.*, pp. 337-338.

duties, as well as the rights, attendant upon territorial jurisdiction, are stated by international law. As a matter of practical operation, then, the responsibility of the state is to be ascertained from the duties of control within its territorial limits and over its agents laid down for it by positive international law; and these will be the subject of investigation in the following pages. Here, as elsewhere, some rules have been picked out for legal enforcement, while others have remained a matter of comity. It is sometimes objected, however, that international law is not true law; and that consequently the responsibility of states is not a legal responsibility, but only a moral one. The objection is of little weight to-day and may be disposed of in a few words.

§ 3. It is only the Austinian conception of a command from a superior which prevents a general acceptance of international law as law; and that definition no longer goes unchallenged.¹² "Austin's so-called definition," says Judge John Bassett Moore, "is at most merely a description of municipal law, and even for that purpose is not sufficiently comprehensive, since it would, for instance, exclude a large part of constitutional law, much of which, like a considerable part of international law, is not enforced by courts by means of specific penalties."¹³ Modern definitions of law are much broader, as, for example, that of Ihering:

Law is the sum of the compulsory rules in force in a state. Its two elements are rule, and realization of it through coercion. Only those rules deserve the name of law which have coercion, or, since the State has a monopoly of coercion, which have political coercion behind them.¹⁴

If the criteria thus set up by Ihering be accepted, the rules of the

¹² "It may be fairly doubted whether a description of law is adequate which fails to admit a body of rules as being substantially legal, when they have received legal shape, and are regarded as having the force of law by the persons whose conduct they are intended to guide," Hall, *International Law*, pp. 14-15. "It is no longer seriously maintained that the existence of law is necessarily dependent upon the presence of a power to enforce it," Hyde, *International Law*, I, pp. 10-11. See also Krabbe, *The Modern Idea of the State*, Introduction by G. H. Sabine and W. J. Shepard, p. xxix; Hershey, *Essentials of International Public Law* (New York, 1918), p. 6.

¹³ Moore, *International Law and Some Current Illusions* (New York, 1924), p. 292.

¹⁴ Ihering, *Law as a Means to an End* (Boston, 1913), p. 239. In the following pages, he discusses the various viewpoints as to international law, and asserts that it is true law. See also Anzilotti, in XIII R. D. I. P., pp. 303-304; Fauchille, *Traité*, I, p. 514.

international community, it would seem, deserve the title of laws. Certainly rules exist which are obeyed.¹⁵ They have grown up out of customary development; and, partly through necessity, partly through convenience in intercourse, states have submitted to their operation. These rules are laws in the sense that they are state acts. What distinguishes a law from a club rule, or a rule of etiquette, is not so much its method of enforcement as its political character; and if this be correct, certainly the rules of international law are laws.

But to the existence of the rule, it is often said, must be added a force capable of compelling obedience; and it is at this point, of course, that those who deny to international law the character of true law concentrate their attack. It is here that it fails to meet the narrow test of the Austinian definition. An *external* coercive force does exist; but it does not reside in a *superior* political authority. There is no *civitas maxima*. It may be replied to this that the principle of modern life is co-operation, rather than submission to the will of a superior above; and of this tendency, illustrated in religion and business as well as in modern pluralistic theories of government, no better instance can be offered than the law *between* nations, enforced by mutual action upon each other, but with no compelling authority above all. The *external* coercive power which Ihering suggests does certainly exist: cases of its use are too numerous to deserve suggestion. Constantly the state is forced to submit to the execution of the claims of other states under international law. "Indeed," says Judge Moore, "in respect of actual observance, I venture to say that international law is on the whole as well obeyed as municipal law."¹⁶ It may be granted that the lack of international tribunals with sufficient jurisdiction, as well as the frequent lack of sufficient coercion on the part of the injured state, often allows a violation of the law to go unpunished; but the fail-

¹⁵ Many writers are satisfied, when it is shown that rules are accepted and obeyed, that they are rules of law. Thus Schoen, *Haftung*, p. 17: "Der Wille der zur Völkerrechtsgemeinschaft gehörigen Staaten, an eine bestimmte Norm im Verkehr miteinander gebunden zu sein, ist die Basis und gleichzeitig die Sanktion des Völkerrechts."

¹⁶ Moore, *International Law and Some Current Illusions*, p. 300. On page 294, he says: "The world has come to regard the rules governing the intercourse of nations as constituting a system of law, for the maintenance of which even the use of coercion is justified."

ure of the rule to obtain results in these cases no more proves the non-existence of law in international than in municipal affairs. "Un débiteur insolvable," asks Fauchille, "cesse-t-il d'être débiteur?"¹⁷

Some political theorists, and one or two international lawyers, raise the objection of sovereignty. Funck-Brentano et Sorel,¹⁸ practically unsupported by other international law writers except Pradier-Fodéré,¹⁹ assert that states are responsible only to themselves, and that the idea of a reciprocal responsibility is contrary to the conception of sovereignty. To these writers each state is the supreme judge of its own acts, and admits no subjective right on the part of other states against itself. If reparation is made, it is not done as a legal reparation but merely as an expression of good will. It is obvious, however, that rejection of such claims would result in constant strife; consequently, it is necessary for states to temper their rights in practice, and to act as if they were responsible.²⁰ To such absurdities the advocates of sovereignty are necessarily reduced by the facts of practice. States do in practice make claims against one another, asserting that such claims are based upon legal right; and, if at times payment is made under the qualification that it is an act of generosity, in far more numerous cases liability is admitted as a legal obligation, or, if denied, is enforced in the face of opposition. An absolute and irresponsible sovereignty, the final judge of its own acts, is in international relations merely a figment of the imagination, logically impossible in the face of the facts of practice,²¹ though its dead branches yet ramify throughout the entire field of international law, badly hampering its growth.

¹⁷ Fauchille, *Traité*, I, p. 514. "Rights may exist quite apart from the ability to enforce them," Ralston, *Law and Procedure of International Tribunals* (Stanford University Press [1926]), p. 183. Also, Hyde, *International Law*, I, p. 11, and II, p. 3, note 1; *The Prometheus*, 2 Hong-Kong Law Reports 217 (Evans, *Cases in International Law*, p. 17).

¹⁸ Funck-Brentano et A. Sorel, *Précis du droit des gens* (Paris, 1900), p. 224.

¹⁹ Pradier-Fodéré, *Traité de droit international public* (Paris, 1895-1906), I, p. 329.

²⁰ *Ibid.*, p. 330: "Ils devaient, en certaines circonstances, et par égard les uns pour les autres, agir comme s'ils étaient responsables."

²¹ Fauchille, *Traité*, I, p. 514, calls sovereignty a "doctrine fautive et dangereuse." Borchart, *Diplomatic Protection of Citizens Abroad* (New York, 1925), p. 77, note 1, says: "With the growth of international intercourse, the theory has long been abandoned." See Benjamin, *op. cit.*, p. 43; Oppenheim, *International Law*, I, p. 48; Strupp, *Völkerrechtliche Delikt*, p. 5, note 1; Schoen, *Haftung*, pp. 16-17. For more

As a corollary to the doctrine of external sovereignty, the more plausible argument is often advanced that it is not really international law which is being enforced, but domestic law. Such a position betrays an entire miscomprehension of the position of the state in international society. It is quite true that many of the rules of international law are restated in domestic codes and are thereby enforced; but this is done, not as an independent action at the volition of the sovereign power of that state, but because the state is obligated to execute such laws as the international community has agreed upon. International law is binding upon all states, and must, therefore, be regarded and enforced as part of the law of that state. It will be seen, in the following pages, that no municipal law may stand if it is in conflict with international law; and, on the other hand, that municipal law must include and enforce certain rules required of it by international law. It will be seen again, that decisions of municipal courts contrary to international law are not final, but, on the contrary, serve to make the state responsible.²² That international law exists outside of and beyond domestic codes is proved by the fact that it is effective in many cases where it would be impossible for municipal law to operate. Thus, a domestic law declaring slave-trading to be piracy would not justify a state in seizing foreign ships outside its jurisdiction; but an international law defining piracy gives authority for the seizure of any ship guilty of that crime.²³ National courts may be unable to control the actions of their own political officials, but the state may be held responsible at international law for their acts.²⁴

general discussions of the doctrine of sovereignty: Lansing, *Notes on Sovereignty*, published as Pamphlet No. 38 of the Carnegie Endowment for International Peace, and found also in *A. J.*, I, pp. 105, 297, and *A. J.*, XV, p. 13; J. W. Garner, "Limitations on National Sovereignty in International Relations," *American Political Science Review*, XIX (1925), p. 1; Borchard, "Political Theory and International Law," in Merriam (Ed.), *Political Theories of Recent Times*, Ch. IV.

²² "The defense of *res adjudicata* does not apply to cases where the judgment set up is in violation of international law," Moore, *Digest*, VI, p. 694. For a fuller discussion of these propositions, see Chapter III, *infra*.

²³ *Le Louis*, 2 Dodson 210, at p. 251: "No nation can privilege itself to commit a crime against the Law of Nations by a mere municipal regulation of its own." See also *The Fortuna*, 1 Dodson 81; *The Resolution*, 2 Dallas 1; *The Nereide*, 9 Cranch 388.

²⁴ Wright, *Enforcement*, p. 28.

While the constitutional lawyer may be correct, from an internal viewpoint, in asserting that domestic courts are bound by their sovereign, the constitution of a state cannot be made the stopping-point. The world reaches far beyond the national horizons; and its law permeates all states. Since international law is by necessary implication the law of all states, it must be regarded as the law of each; and, consequently, no domestic law can stand against it. To the law of nations, internal acts, acts of agents of the state, have no significance: when they sin, it is the state itself which has sinned. The state is an entity, free to make such internal dispositions as it may desire, provided only that they make possible the fulfillment of the international obligations of that state.²⁵ The authority which gives orders to the agencies within the state must respect international law because it is part of the law of that state; and, if the constitution or laws of the state come into conflict with the rules which issue from the international community, they cannot be set up as a demurrer against claims arising therefrom.²⁶

²⁵ Such was the argument of the United States when the French legislature failed to make the appropriations necessary under the treaty with regard to the spoliation claims: "Neither government has anything to do with the auxiliary legislative measures necessary, on the part of the other state, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfill it proceeds from the failure of one or the other of the departments of its government to perform its duty in respect to it," Wharton, *Digest of the International Law of the United States* . . . (Washington, 1887), I, p. 36. See Borchard, *Diplomatic Protection*, pp. 199, 201; Phillimore, *Commentaries*, I, § CXX; Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), p. 361; Anzilotti, in XIII R. D. I. P., pp. 298, 301; Wright, *Control of American Foreign Relations* (New York, 1922), p. 15 and note 8, where he says that "States are responsible as units, and that this responsibility is unaffected by domestic law"; Dana's Wheaton, *International Law*, note 250, p. 543; "It is conceded that the refusal of one portion of a foreign government, whose concurrence is necessary to carry into effect a treaty with another, may be regarded, in strictness, as tantamount to a refusal of the whole government," Clay's Report from the Foreign Relations Committee, Wharton, *Digest*, III, p. 91. See also M. Renault's reply to Baron Marschall von Bieberstein at the Second Hague Conference, *Actes et documents*, I, p. 468.

²⁶ See, for an excellent recent recognition of this principle, the treaty between Italy and Switzerland, *League of Nations Treaty Series*, No. 834, Vol. 33 (1925), p. 99, Article 17: "Should the Permanent Court of International Justice find that a decision of a court of law or other authority of one of the contracting states is wholly or partly at variance with international law, and should the constitutional law of that state not allow, or only inadequately allow, the cancellation of this decision by administrative procedure, the Party prejudiced shall be allowed equitable satisfaction in some other form." The same clause will be found in the treaties between Switzerland and Germany (1921), *ibid.*, No. 320, Art. X; Switzerland and Hungary (1924), *ibid.*, No. 887, Art. XVI; Germany and Sweden (1924), *ibid.*, No. 1036, Art. X; and others.

An obligation remains after the sovereign power has acted—an obligation which can be enforced.

If we continue to regard international law from a positivist standpoint, the above conclusions cannot be avoided by the quibble that national sovereignty remains absolute because it concedes obedience of its own free will. As a matter of actual practice, chanceries no longer deny international law upon this ground.²⁷ While the theory is sometimes advanced that a state is not bound by a rule to which it has not given its consent, that consent is implied for existing law as truly as the individual's submission to domestic law is implied from the fact that he is found under the jurisdiction of that law. "The acceptance of this law is an essential condition upon which states are admitted to the society of nations; its binding effect is not therefore dependent upon their consent; and it has frequently been asserted by governments that a state which repudiates its authority places itself outside the pale of international intercourse."²⁸ The accolade of recognition, by which new members are admitted into the society of nations, not only implies the ability but confers an obligation to execute international law; and once a state is admitted to that society, it can no more, by its unilateral action, declare an existent law invalid than it can create a new law. It is easy to confuse the fact that the state is the only existing agency for enforcing international law with its right to do so. The state has not only a right, but a duty, to enforce international law within its boundaries—a duty whose non-observance is punishable. It is a duty which has often been asserted by our courts, as well as by international tribunals. Thus the Supreme Court of the United States said:

A right secured by the law of nations to a nation, or its people, is one

²⁷ When a state offers opposition to a claim under international law to-day, it is never a denial of the force or authority of that law as a whole, but a denial that the particular rule invoked is really international law, or applicable.

²⁸ Garner, "Limitations on National Sovereignty in International Relations," *American Political Science Review*, XIX, p. 13. He quotes, among others, Rivier, *Principes du droit des gens*, I, p. 22, to the effect that no state has in our time dared to declare that it would not be bound by international law. See also Hyde, *International Law*, I, pp. 11-12: "This [the obligation of international law within a state] is true although there be no local affirmative action indicating the adoption by the individual State of international law; for the processes by which general acquiescence in its principles has been effected manifest the requisite irrevocable assent of each member of the society of nations."

the United States as the representatives of this nation are bound to protect. Consequently a law which is necessary and proper to afford this protection is one that Congress may enact because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the States. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they owe to another nation, and which the law of nations has imposed on them as part of their international obligations.²⁹

The *raison d'être*, then, behind the municipal laws which state international law, is the international obligation, and not the volition or generosity of the state. It is true, of course, that the legislative organs of a state are not bound to any phraseology, or even to a consideration of the problem, if any other part of the machinery of the state is competent to handle it; for the state is left free to determine what machinery it shall provide for the execution of its external obligations. It is, however, in most states a legislative function; and, if so, the legislature is not able to omit from its consideration a requirement of international law, much less to modify such an obligation according to its own convenience. Any defect in the municipal mechanism through which an international obligation lacks proper execution brings responsibility; and cases from the time of *Mattueof*³⁰ to date show how that responsibility has been enforced. Thus, in the Alabama Award:

And whereas the Government of Her Britannic Majesty cannot justify

²⁹ *U. S. v. Arizona*, 120 U. S. 487. See statement in Evans, *Cases*, notes, p. 51: "With rights go obligations and a state which fails to provide for the discharge of its international responsibilities is nevertheless internationally liable. It is the duty of every member of the family of nations to provide itself with such a governmental organization as will enable it to meet all those duties and obligations which its position imposes upon it." "It is thus an obligation, imposed by international law itself upon states to enforce that part of international law relating to the conduct of persons within their jurisdiction through their municipal jurisprudence. It is for states to supply the lack of a world administration for the execution of international law. As state courts of the United States enforce the federal constitution, laws, and treaties, so it is the duty of independent governments to see that their courts enforce international law and that their executive authorities execute it," Wright, *Enforcement*, p. 16. Mr. Wright cites in support *Respublica v. Longchamps*, 1 Dallas 111; *The Scotia*, 14 Wallace 170; *Paquete Habana*, 175 U. S. 677; *Hilton v. Guyot*, 159 U. S. 113; *Triquet v. Bath*, in Scott, *Cases*, p. 6; *Le Louÿs*, 2 Dodson 239; *The Recovery*, 6 Rob. 348; and others.

³⁰ Martens, *Causes célèbres du droit des gens* (Leipzig, 1858-1861), I, p. 73.

itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed. . . .⁸¹

or again, in a forcible expression from the *Montijo Case*:

It is true that he had not the means of doing so, there being at hand no military or naval force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation. The first duty of every government is to make itself respected both at home and abroad.⁸²

It is unnecessary to carry further an investigation which might be extended to cover the entire history of international law. Its development has been quite natural. The mutual necessities of intercourse between states have produced an observance of international rules which seems marvelous as one looks back over it. The old arguments based upon sovereign irresponsibility have been replaced by a very definite responsibility; and how completely this is true will be found implicit in the cases discussed in the following pages.

§ 4. Historically, the idea of a responsibility between states may be traced back to the vague origins of rights and duties which have always been regarded as fundamental by mankind. Among these is the conviction that reparation should be made for an injury committed; and this idea of responsibility, whether between persons or states, is as old as morality itself. The Old Testament law was "an eye for an eye and a tooth for a tooth"; and it was

⁸¹ Wharton, *Digest*, III, p. 633.

⁸² Moore, *Arbitrations*, p. 1444. See also *ibid.*, p. 2861 (*Baldwin*); Pradier-Fodéré, *Traité*, I, p. 336; Strupp, *Völkerrechtliche Delikte*, pp. 59-60; Bar, *De la responsabilité des États à raison des dommages soufferts par des étrangers*, 31 *R. D. I. L. C.* (2nd Ser., 1), p. 473; de Visscher, *Responsabilité*, p. 101. "Nations are bound to maintain respectable tribunals to which subjects of states at peace may have recourse for the redress of injuries, and the maintenance of their rights," Webster to the Chevalier d'Argaiz, June 21, 1842, Moore, *Digest*, II, p. 5. *Re* the duty to appropriate money for the execution of a treaty, Moore, *Digest*, V, § 759; and to legislate for the same purpose, *ibid.*, § 758.

On this whole subject Triepel is very valuable, especially §§ 12-14. See also Despagnet, "Les difficultés venant de la constitution de certains pays," in *Revue générale de droit international public*, II, p. 189: "Il est universellement admis qu'un peuple ne peut pas se dégager de ses devoirs internationaux en alléguant les lacunes ou l'impuissance de sa législation; à lui de l'améliorer ou de la compléter. . . ." Lansing, in *Proc. Am. Soc.*, II, p. 45: "If sufficient powers have not been delegated to the government, the sovereign is at fault, and other states may justly complain and even compel the delinquent to fulfill its obligations"; Wright, "International Law in Its Relation to Constitutional Law," in *A. J.*, XVII, pp. 241-242; Borchard, *Diplomatic Protection*, p. 213; Moore, *Digest*, VI, pp. 695, 848.

applied between nations as well as between individuals.³³ The Greeks were accustomed to the use of reprisals: at first the state permitted its citizens to seize persons or property in return for injury done them; later, as its interest increased, the state itself assumed the function, and employed reprisals against other states not merely on account of attacks upon its citizens, but because of attacks upon itself.³⁴ In addition to reprisals, whose use has continued in one form or another down to the present day, the duty of making reparation for injurious acts was occasionally recognized in a treaty, or by an arbitration.³⁵ In the medieval period, the state was regarded as a collectivity, with each member thereof responsible for an injury done by any other member. The sense of responsibility remained, however, without adequate expression until the time of Grotius.

When Grotius took up his pen in the seventeenth century, he had as little here as elsewhere to build upon. While the idea of obligation between states is implicit throughout his work—as indeed it must be in any discussion of international law—he makes no effort to treat the subject as a whole. Nevertheless, one is here forced “back to Grotius,” as, in a wider field, one has long been forced “back to Aristotle.” The rules which he laid down incidentally, in various connections, are even yet followed by many writers and judges, and are unquestionably valid in part to-day. He inquires especially how far a state may be held liable for the injuries committed by its agents,³⁶ and how far for those by private

³³ Leviticus 24, 20. As applied to states: “But Adonibezek fled; and they pursued after him and caught him, and cut off his thumbs and his great toes. And Adonibezek said, Three score and ten kings, having their thumbs and their great toes cut off, gathered their meat under my table; as I have done, so God hath required me,” Judges 1, 6-7; and see 2 Kings 18, 14.

³⁴ The Greek custom was known as *androlepsia*. See, as to the origins of reprisals, the learned note by Dr. Hyde, *International Law*, II, p. 173 and p. 589. It was a medieval theory, supported by the Church, “que la collectivité repend des crimes ou delits commis par un de ses membres et qu'elle n'a su empêcher,” Nys, *Les origines du droit international* (Brussels, 1894), Ch. IV, Sec. 2. See also Walker, *History of the Law of Nations* (Cambridge, 1899), Vol. I, pp. 40-52; Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London, 1911), II, Ch. XXVII; Moore, *Digest*, VII, §§ 1095-1096.

³⁵ As, for example, the Intercursus Magnus, between Henry VII of England and Phillippe-le-Beau of France, in 1496. It was herein agreed that if damage were done it should be repaired by the Prince. See Nys, *op. cit.*, p. 75. As to arbitrations, Phillipson, *op. cit.*, II, Ch. XXVII; Tod, *International Arbitrations Amongst the Greeks* (Oxford, 1913), Ch. II.

³⁶ Grotius, *De Jure Belli et Pacis*, with English translation by Whewell (Cambridge,

individuals.³⁷ His answers are based partly upon the Roman Law governing relations between individuals, and partly upon natural law. Any omission or commission contrary to man's duty is a fault from which, by the law of nature, an obligation arises to make reparation for the damage occasioned.³⁸ But the obligation is contingent upon *culpa*: "A civil Community, like any other Community, is not bound by the act of an individual member thereof, without some act of its own, or some omission."³⁹ Here enters the Grotian idea of fault: the state cannot be held responsible without a fault of its own, but it may become an accomplice, through its own fault, in two ways—*patientia et receptus*.⁴⁰ A state may be responsible through its own act, or through its failure to prevent the act of another, if it knew of the latter act and was able to prevent it. But no one can be punished for another's fault, since all punishment is founded upon guilt.⁴¹

Thus, Grotius laid down the two broad principles of state responsibility: for its own acts, and for the acts of its members when its own fault was involved. It may be said that his teachings were dominant until the end of the nineteenth century, and, though attacked from various angles to-day, are still of weighty influence.⁴² Since, in practice, his exceptions would destroy the force of his rule, some of his followers interpreted it by the assumption that the state knows of, and is able to prevent, crimes within its jurisdiction.⁴³

1883), Book II, Ch. XVII (De damno per injuriam dato, et obligatione quae inde oritur), XX.

³⁷ *Ibid.*, Ch. XXI (De poenarum communicatione). Schoen, *Haftung*, p. 4, corrects Anzilotti's statement that Grotius discusses responsibility only for individual acts.

³⁸ Grotius, *op. cit.*, Book II, Ch. XVII, I: "Ex tali culpa obligatio naturaliter oritur, si damnum datum est, nempe ut id resarciatur."

³⁹ *Ibid.*, II, XXI, II, 1: "Communitas ut alia ita et civilis non tenetur ex facto singulorum sine facto suo, aut omissione." Whewell's translation is quoted in the text.

⁴⁰ *Ibid.*, I, XXI, II, 2: "Ex his autem modis quibus rectores aliorum in crimen veniunt, duo sunt qui maximum usum habent et diligenti consideratione indigent; *patientia et receptus*."

⁴¹ *Ibid.*, II, XXI, XII: "neminem delicti immunem, ob delictum alienum, puniri posse."

⁴² See references and quotations in Schoen, *Haftung*, pp. 6-12 and notes.

⁴³ "Foreign nations have a right to take acts done upon the territory of a state as being *prima facie* in consonance with its will; since, where uncontrolled power of effective willing exists, it must be assumed in the absence of proof to the contrary that all acts accomplished within the range of the operation of the will are either done or permitted by it," Hall, *International Law*, p. 64; also *ibid.*, p. 268; Phillimore, *Commentaries upon International Law*, I, § 218; Schoen, *op. cit.*, p. 7.

But, for the most part, writers have concerned themselves very little with the problem, being content to give it a purely incidental discussion, in connection with other matters.⁴⁴ Heffter was the first to make an effort to collect material upon the subject. He simply transfers the rules of civil law into the international realm, and organizes obligations as those arising from treaties (*ex contractu*), and those arising without treaty, either from legal acts (*quasi ex contractu*) or illegal acts (*ex delicto*). It cannot be said that Heffter contributed much to the analysis of the subject, though he collected and organized material separately, and thus prepared the way for the recognition of responsibility as an institute of international law.⁴⁵

⁴⁴ In conjunction with, treaties: A.-G. Heffter, *Le droit international public de l'Europe*, French translation by Bergson (Paris, 1866), §§ 100-104; F. Liszt, *Das Völkerrecht systematisch dargestellt* (11th ed., Berlin, 1918), § 25; F. Despagne, *Cours de droit international public* (3rd ed., Paris, 1905), § 466; Baron L. Neumann, *Elements du droit des gens modern européen* (Paris, 1886), Part I, Ch. III, § 36b; A. Rivier, *Principes du droit des gens*, Vol. II (Paris, 1896), Book VII, § 48; P. Pradier-Fodéré, *Traité de droit international public européen et américain suivant le progrès de la science et de la politique contemporaine* (Paris, 1885-1906), Vol. II, §§ 1221-1224; K. Strupp, *Das Völkerrechtliche Delikt*, Stier-Somlo Handbuch des Völkerrechts, Dritter Band (Stuttgart, 1920), p. 9, note 7.

In relation to war, or to the settlement of international disputes: K. Garciis, *Institutionen des Völkerrechts* (Giessen, 1901), Book II, § 76; J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (Nordlingen, 1878), Nos. 462-473a; S. Pufendorf, *De jure naturae et gentium* (London, 1672), VIII, cap. VI, § 12.

Under mutual duties: Halleck, *International Law*, 4th ed. by Sir G. Sherston Baker (London, 1908), Ch. XIII, § 3; E. Vattel, *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (Paris, 1820), Book II, Ch. VI.

Some of the modern writers give responsibility more distinct treatment: L. L. Oppenheim, *International Law, a Treatise* . . . 3rd ed., edited by Ronald F. Roxburgh (London, New York, etc., 1920-1921), Vol. I, Part I, Ch. III; Paul Fauchille, *Traité de droit international public* (Paris, 1924), Vol. I, Ch. VII; Fiore, *International Law Codified and its Legal Sanction*, translated from the 5th Italian edition by E. M. Borchard (New York, 1918), I, Title XXI; A. S. Hershey, *The Essentials of International Public Law* (New York, 1918), Chapter X; G. Diena, *Principi di diritto internazionale* (Naples, 1914-1917), Ch. IV, Sec. II; C. Bevilacqua, *Direito Publico Internacional, a synthese das principios e a contribucao do Brasil* (Rio de Janeiro, 1911), I, Titulo I, cap. V; J. Hatschek, *Völkerrecht, als System rechtlich bedeutsamer Staatsakte* (Leipzig, 1923), IV Abschnitt, pp. 385-410; W. E. Hall, *International Law* (8th ed., Oxford, 1924), §§ 11, 65. C. C. Hyde, *International Law, Chiefly as Interpreted and Applied in the United States* (Boston, 1922), discusses it under Title C, Part II, "Rights and Duties of Jurisdiction."

The texts named above will be hereafter cited by the author's name and short title.

⁴⁵ Heffter, *Droit international*, §§ 100-104. Schoen shows how many subsequent writers have followed Heffter's arrangement, *Haftung*, pp. 8-9. Benjamin, *Haftung des Staates aus dem Verschulden seiner Organe nach Völkerrecht* (Heidelberger Diss., 1909), p. 13, criticizes severely the private law derivation used by Heffter, and

The pioneer in this field is Triepel.⁴⁶ Not only is he the first to give the subject an independent and specialized treatment, but he is the first to attack seriously the Grotian theory of fault. His study is devoted to the necessity of providing internal law in harmony with international obligations; and, while it cannot therefore be regarded as a treatise upon responsibility, it laid firmly the foundations for the modern treatment of that principle. This treatment has been continued by the Italian scholar Anzilotti,⁴⁷ and by the Germans, Schoen⁴⁸ and Strupp;⁴⁹ and their work may be regarded as having set up state responsibility as an institute of international law.⁵⁰ The exhaustive treatise of Professor Borchard, while concerned primarily with the protection of aliens, is probably the most valuable study yet made of the subject.⁵¹ In addition to monographs bearing directly upon the subject as a whole, there are many special studies of such matters as the responsibility for damages arising out of civil commotions, or the acts of individual citizens, or the problems of the federal state.

points out that the obligations of international law are quite different from those of private law. H. E. Yntema (XXIV *Columbia Law Review*, p. 137) is inclined to give to Heffter a more important position.

⁴⁶ H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899).

⁴⁷ D. Anzilotti, *Teoria generale de la responsabilita dello Stato nel diritto internazionale* (Firenze, 1902); and an important article entitled "La responsabilité internationale des États à raison des dommages soufferts pas des étrangers," in the *Revue générale de droit international public*, Vol. XIII, pp. 5 and 285. The former will hereafter be referred to as, "Anzilotti, *Teoria*"; the latter as, "Anzilotti, in XIII R. D. I. P."

⁴⁸ Paul Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen*, Ergänzungsheft 2 zur Zeitschrift für Völkerrecht, Band X (Breslau, 1917).

⁴⁹ Karl Strupp, *Das völkerrechtliche Delikt*, Stier-Somlo Handbuch des Völkerrechts, Dritter Band, Erste Abteilung (Stuttgart, 1920).

⁵⁰ Strupp gives to Schoen this credit, *op. cit.*, p. 3. See Schoen, *op. cit.*, p. 21: "Ist die Haftung lediglich eine ganz allgemeine Folge des Umstandes, dass der Staat im zwischenstaatlichen Verkehr einer Rechtsordnung unterstellt ist, so handelt es sich beim ihr um ein allgemeines völkerrechtliches Rechtsinstitut, das logisch richtig zur Darstellung nur gebracht wird im zusammenhange mit der Erörterung der allgemeinen Rechte und Pflichten, die die Staaten als Subjekte des Völkerrechts haben, nicht aber in Verbindung mit den völkerrechtlichen Verträgen oder einer anderen Spezialmaterie des Völkerrechts."

The tendency of these writers is to create an objective responsibility upon the part of the state, upon the assumption that since individuals cannot be subjects of international law, the state can be held responsible, under that law, only for its own acts, and not for those of individuals within the state. With the act of the individual thus eliminated, the *culpa* which Grotius demanded also disappears—in varying degrees, according to the writers. Their views will be considered in the following chapters. A critical discussion of most of them will be found in Jess, *op. cit.*, *passim*.

⁵¹ E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York,

There can be no doubt that to-day responsibility is recognized between states as a fundamental principle of international law, implying an obligation upon the part of the state under whose jurisdiction an offence was committed to repair the damage done. While its application to a particular set of circumstances may be disputed, the principle itself is never questioned in the practice of states; and many cases and conventional agreements exist to attest to its validity.⁵² Nevertheless, as has been said, it was not until the present century that the subject has been given detached study and treatment, and that an effort has been made to formulate more

1915). Other monographs upon the subject are cited in the bibliography for this volume.

⁵² Spectacular examples of its application in recent times may be found in the penalties imposed upon China after the Boxer uprising, and upon Greece because of the murder of General Tellini. (For these, see § 53, p. 185, *infra*.) The United States courts have recognized it in many cases, notably in *U. S. v. Arjona*, 120 U. S. 479, quoted on page 14, *supra*. The Hague Tribunal, in deciding the *Carthage Case*, said: "Considering that, in case a Power should fail to fulfill its obligations, whether general or special, to another Power, the establishment of this fact, especially in an arbitral award, constitutes in itself a serious penalty," Scott, *Hague Court Reports* (New York, 1916), p. 335. Among conventional statements, that of the Hague Convention of 1907 "Respecting the Laws and Customs of War on Land" is probably the best known: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Many treaties admit responsibility, under varying circumstances; and the Covenant of the League of Nations gives definite recognition to it. Numerous cases will, of course, be found in the following pages.

It should be noted that we are here concerned with responsibility for admitted and existent rules of international law, since it is only for the violation of such rules that a legal responsibility may be incurred. Consequently, it is unnecessary to discuss the famous Article 231 of the Treaty of Versailles: "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her Allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggressions of Germany and her Allies." While the clause is none the less valid, as part of a binding treaty, it is founded upon the will of the conquerors rather than upon an existent rule, the violation of which by Germany rendered her responsible. It may possibly be regarded as an attempt at international legislation, the validity of which remained contingent upon the acceptance of the rule therein implied by all nations. The same may be said of the clauses which attempted to hold the Kaiser Wilhelm II personally responsible. See Larnaudé and de Lapradelle, *Examen de la responsabilité pénale de l'Empereur Guillaume II*, in which an endeavor is made to posit a new rule of international law against originating war, with the argument that the rule was confirmed by President Wilson's messages. Outside of the fact that this would be *ex post facto* action, the subsequent failure of efforts to outlaw war establishes the lack of responsibility under international law.

However, those clauses of the Treaty of Versailles, and similar treaties, which claim reparation for damages caused by violations of existent rules of the law of war afford examples of a legal responsibility.

precisely the statement of its applications.⁵³ Both writers and tribunals have accepted it in principle, and then proceeded to apply it as they saw fit, to the great confusion of practice. The construction of the principle of responsibility merits closer study than this; for no more vital conception exists in law. As usual, more attention has been directed toward rights than toward duties; and the consistent practice of states reveals the need of clearer interpretation of the principle. These inconsistencies of practice at the same time make it difficult to establish undoubted rules, for it is from the customary practice of states that rules of international law must be deduced; and it becomes necessary to attempt to discover the prevailing tendencies and to ascertain their value as guide posts for future direction.

§ 5. It appears indispensable, before proceeding to an exposition of the operation of the principle of state responsibility, to lay down certain principles and distinctions in summary form, for the guidance of the reader. While the principle of responsibility must necessarily be, and always is, admitted by those who regard international law as law, there is little agreement to be found as to its application and operation. A chaos of interpretation reigns. It is here suggested that the chief cause of the inconsistencies found in writers, and among statesmen and international tribunals as well, is uncertainty as to the exact bearing of the word responsibility itself. It would appear to be simple enough in its meaning, if one thinks back to the significance of obligation; but there is nevertheless much disagreement as to its use. By some, it is limited to such obligations as produce a need for pecuniary indemnity; by others to such injuries as justify diplomatic interposition. In the latter group, many modern writers are to be found, because of the theory that only states are responsible persons, and that consequently responsibility appears only when one state presents a claim to another. This, it is submitted, is to confuse the principle itself with the method of enforcement. Responsibility is simply the principle which establishes an obligation to make good any violation of international law producing injury, committed by the respondent state.

⁵³ Borchard, *Diplomatic Protection*, p. 177, note 1: "The subject of state responsibility in international law has been more or less neglected by writers, notwithstanding its great importance." Also, Schoen, *Haftung*, p. 2; and *contra*, Pearce Higgins' comment in Hall, *International Law*, pp. 272-273, note 1.

Whether reparation be made through diplomacy or in other manner is a matter of procedure, and an entirely distinct problem. The problem, in the latter case, is not whether responsibility exists in principle—it always does, if an internationally injurious act has been committed by a state—but whether the responsibility incurred is to be discharged by methods of local redress, or through diplomatic interposition, calling for pecuniary or other reparation from state to state directly. Responsibility appears, in principle, at the moment that the internationally injurious act has taken place within the control of the state.⁵⁴ While diplomatic action may not be appropriate, or material reparation demandable, until the state has defaulted in its obligation of giving local redress, responsibility nevertheless exists if an internationally illegal act may be imputed to the state.

This distinction is vital, and must be insisted upon. In the process of adjusting international claims, the rule is constantly encountered that local remedies must be exhausted before diplomatic interposition is in order. It is so closely interwoven in such adjustments that writers and arbiters have often confused substance with procedure. Even where understanding of the true differentiation exists, the phraseology adopted is often misleading. For these reasons, it has been thought desirable to include in the following chapters a statement of the procedure applicable to each group of cases for which responsibility is found, although full discussion of the operation of the rule of local redress is reserved for a later chapter.⁵⁵

The rule of local redress is the dividing line between the substantive and the procedural aspects of responsibility. Liability exists from the moment in which the internationally illegal act is established; and it is always a direct responsibility,⁵⁶ owed by one state to another. But when it is a matter of the methods by which the responsibility may be discharged, international law permits redress to be made in certain cases through the internal agencies of the

⁵⁴ See the Projects submitted by the American Institute of International Law to the Governing Board of the Pan-American Union, *A. J.*, XX, *Supplement*, p. 304, Project No. 4, Articles 1-5; Strupp, *Völkerrechtliche Delikt*, p. 222; Resolutions of the *Institut de Droit International*, 1927, Appendix III, *infra*.

⁵⁵ The rule of local redress is discussed in Chapter V, *infra*.

⁵⁶ See Chapter X for a criticism of the distinction between direct and indirect responsibility. Perhaps one should rather say, always indirect; since the state can never act for itself, but only through individuals who are its agents.

state, while at other times it requires reparation to be made from state to state through diplomatic channels. The dividing line between these two methods is not to be found in differentiating individuals from state agents, or omissions from commissions, but simply and comprehensively according as the state has or has not provided agencies of local redress satisfactory to the international community. The responsibility of the state, it must be repeated, is always present in principle and always direct, from the moment the injurious act is proved; but the measure of reparation due therefor may be diminished, even to the vanishing point, by the proof of a due diligence in the operation of the local agencies which the state has established. The standard set for such agencies is an international, not a municipal one; but, in practice, by far the greater number of cases are settled by internal action, and this tendency increases as internal standards are steadily raised to the level and uniformity required by the community of nations.

The difficulty is accentuated by the fact that local remedies have a double function to perform. In certain cases, as for example where the state has failed in its duties of prevention, the satisfactory operation of local means of redress serves as complete reparation; and it is not permissible to appeal to diplomatic interposition. In other cases, no responsibility appears at all until the local measures of redress have been shown to be unsatisfactory, according to the requirements of international law. In this aspect, local remedies, instead of discharging responsibility, lay the foundation for it. Such a situation may appear either when, as in the first case, responsibility has already appeared, and would ordinarily be discharged by the operation of local remedies, but the local remedies function improperly; or when, as in the second case, no responsibility has yet appeared, but is produced by the unsatisfactory operation of local remedies. In either situation, diplomatic interposition becomes available at once.

In practically every type of case, local remedies must be utilized if they are provided and are entitled to respect; and only where they fail to meet the requirements of international law, does diplomatic interposition appear to be justifiable. But it would be a mistake to say that only where diplomatic action is called for does state responsibility appear. That responsibility is in principle abso-

lute and objective, arising at the moment the internationally illegal act occurs; but the methods by which the claim is to be presented and the reparation is to be made vary according to the circumstances. It will be necessary to distinguish carefully, in the following pages, between the substantive and the procedural in the discussion of each type of case in which responsibility is to be found; but it must be borne in mind that the responsibility of a state is produced by nothing more nor less than its failure to meet its international obligations.

CHAPTER II

RESPONSIBLE PERSONS

§ 6. International law, it has been observed, acknowledges each state to be the possessor of exclusive control within its territorial limits. When a state has been recognized by the community of nations, it is presumed to be capable of exercising the rights and duties of membership in that community.¹ International law is not concerned with the form or organization which the political entity recognized may care to adopt. The community of nations asks only that its members shall have machinery capable of discharging efficiently its obligations under international law.²

As a natural result of this freedom of constitution, there has appeared a variety of forms of state organization which presents to textwriters a highly puzzling problem of classification.³ It is no longer possible to say that only Christian, or only European, or only sovereign, states are members of the international community and have international personality. Too great a variety of political forms has appeared, and too varied a number of relationships between states. When we consider the complex historical forces which have operated to produce these differing political connections, it becomes manifest that no sufficient uniformity exists to permit a

¹ "Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war," Webster to Thompson, April 15, 1842, Moore, *Digest*, I, p. 5.

"En se reconnaissant mutuellement comme souverains, les États se reconnaissent comme juridiquement égaux dans l'exercice de toutes les prérogatives inhérentes à cette souveraineté; les relations futures qui dériveront de cette reconnaissance s'établiront donc sur la base d'une parfaite réciprocité de droits et devoirs. La responsabilité des États est donc dans l'ordre international le corollaire obligé de leur égalité," de Visscher, *Responsabilité*, p. 90.

² "The fundamental question in the recognition of a government is whether it shows ability and a disposition to discharge international obligations," Speech of Secretary Hughes, March 21, 1923, *A. J.*, XVII, p. 296.

³ The confusion is well displayed in Fenwick, *International Law*, Chapter VI. See also Lawrence, *International Law*, p. 52.

strict or useful classification. Each case must be judged upon its own merits.

With such a confusion of forms and relationships, it is readily understandable that there may be difficulty in locating the responsible person in a given set of circumstances. The search is the more perplexing because it must often be carried out in the narrow borderland between the legal and the political factors of international relationship. It has been seen that the responsibility of a state depends upon its control; and states are presumed to have control internally. But it is necessary to consider the possibility of the interjection of an outside power, limiting in some respects the internal freedom of action which a state may possess. The investigation involves, upon the one hand, the control which a state, as a member of the international community, is expected to maintain within its own territory; and, on the other hand, the degree to which external restraints may have been established over that state, thereby hampering its freedom of action, and the control which it may be able to exercise. There are thus two questions to be answered, in any case: first, to what extent does the state have a control unembarrassed by outside interference, and, therefore, to what degree may it be held responsible? and second, granted freedom from external restraint, what duties does international law impose upon states through their internal organization, the failure of which will engender responsibility? The first question must be answered before the second; for it is obvious that, if responsibility depends upon the control which a state has over those who may commit injuries, the external limitations set upon a state may make it impossible for her to maintain a proper internal control. The object of this chapter will be, then, to ascertain the degree to which the various political entities are hampered by external forces, and consequently the degree to which they may be held responsible.

It may be shown that every state is subject to external limitations which differ in extent and kind from those of every other state. These limitations arise from general or special treaties, or from the positive law of nations approved by general usage. They operate, says Dickinson,

to restrict the legal capacity of the state as an international person, rendering it incapable of acquiring certain international rights or of entering

into certain international transactions. External limitations have two important characteristics: (1) the state cannot divest itself of its incapacity by its own act; (2) the state is placed in a position of legal incapacity with respect to the entire community of nations.⁴

Naturally, where capacity to execute does not attach, responsibility should not be imposed. The community of nations expects that its members shall be able to perform their obligations as against any internal opposition; and no internal limitation may be pleaded against an international claim. It is presumed to be omnipotent internally; but there are external forces which it may be quite unable to resist, and these must be taken into consideration in allocating responsibility. In actual practice, rights and duties belong in varying degrees to each political entity; and the touchstone to be applied is always actual control in the sense of freedom from external restraint.

§ 7. The great majority of the members of the family of nations are so far free from external control (beyond that equally incident upon all, arising from international law in general) that they are usually classified as full sovereign states; and an overwhelming opinion exists among textwriters that only such states are, in a full measure, subjects of international law.⁵ It is asserted that international law exists for the purpose of regulating relationships between *states*; and that states only can be complete persons under that law. The state must be fully independent of external control before it can be fully responsible. It must be free to take such action as it considers expedient for the performance of its international duties, and this it can not do if it is hampered by conditions imposed upon it from the outside. Only the full sovereign state, it is therefore said, can be a subject of international law.

There are nevertheless many limitations to be found in practice

⁴ Dickinson, *Equality of States in International Law* (Harvard University Press, 1920), p. 221.

⁵ Hershey, *Essentials*, p. 92; Heilborn, *Das System des Völkerrechts entwickelt aus der völkerrechtlichen Begriffen* (Berlin, 1896), p. 58; Schoen, *Haftung*, p. 23, note 8; Anzilotti, in *R. D. I. P.*, XIII, p. 5, and in *Teoria*, p. 115; Gareis, *Institutionen*, p. 47; Liszt, *Völkerrecht*, p. 48; Oppenheim, *International Law*, I, § 13, p. 17; Rivier, *Principes*, I, No. 9, p. 48; Bluntschli, *Völkerrecht*, § 22; Triepel, *Völkerrecht und Landesrecht*, pp. 11, 20; Pradier-Fodéré, *Traité*, I, § 44; Lorimer, *The Institutes of the Law of Nations* (Edinburgh and London, 1883-1884), II, pp. 130-132; Benjamin, *Haftung*, pp. 14-16; Strupp, *Völkerrechtliche Delikte*, pp. 20-23; Despagne, *Cours*, § 69, p. 79.

upon the freedom of the so-called full sovereign states.⁶ It is quite possible, and even frequent, that the action of a state should be controlled, in varying degrees, by another state or states, or by international agreement, that its freedom of action should be limited and thereby its responsibility diminished, and yet without depriving it entirely of its international personality. "Neutralization," says Mr. Dickinson, "imposes certain obvious limitations on legal capacity."⁷ A neutralized state can not make war, as other states may; it would presumably be unable to cede territory; and it can not enter into certain types of treaties.⁸ Again, servitudes, while much debated, must be regarded as restrictions upon sovereign independence.⁹ Many examples may be found of restrictions upon jurisdiction resulting from conditions set for the protection of minorities. Thus, Poland, under Article 93 of the Treaty of Versailles, was obliged to

embody in a Treaty with the Principal Allied and Associated Powers such provisions as may be deemed necessary by the said Powers to protect the interests of inhabitants who differ from the majority of the population in race, language, or religion.

Similar obligations were imposed upon other states in the peace settlement; and they had already been exemplified in the Treaty of Berlin.¹⁰ Restrictions of a different type were fixed upon Serbia in 1908, limiting her freedom of action toward Austria.¹¹

⁶ "Obviously no State is wholly free from external control. The society of nations, notwithstanding its imperfect organization, imposes restrictions which the individual State is not free to disregard. For that reason it might not be inaccurate to describe an independent State as one which enjoys that freedom from external control which is acknowledged to be the possession of the freest States belonging to the international society," Hyde, *International Law*, I, p. 24, note 1.

⁷ Dickinson, *Equality of States*, p. 255.

⁸ Mr. Dickinson points out that Belgium was unable to sign the treaty guaranteeing the neutrality of Luxemburg, or the Hague Convention limiting the employment of force for the recovery of contract debts, *ibid.*, p. 255. "In a word, the effect of the arrangement of neutralization seems to deprive the State that is neutralized of common rights which are possessed and exercised by independent States as the freest members of the international society," Hyde, *International Law*, I, p. 43, note 2. It should be noted that if neutralization is a limitation upon the independence of the neutralized state, it is equally so upon the independence of the guaranteeing state. See Liszt, *Völkerrecht*, 6, IV, p. 63; Strupp, *Völkerrechtliche Delikte*, p. 29, note 1; Fenwick, *International Law*, p. 87.

⁹ Fauchille, *Traité*, I, p. 684; Hall, *International Law*, p. 204, note 1; Dickinson, *Equality of States*, pp. 264-268.

¹⁰ A short summary of such cases is given in Fenwick, *International Law*, pp. 90-91.

¹¹ The obligations assumed by Serbia are quoted in Debidour, *Histoire diplomatique*

In practice, however, it will rarely be found that such limitations as these are sufficient to transfer responsibility. They are restrictions upon political independence, and do not affect matters which would ordinarily give rise to responsibility on the part of a state. It is conceivable that the inability of a state to cede a portion of its territory might render that state incapable of discharging an international obligation; or that prohibitions upon a state relating to the protection of minorities therein might so affect internal jurisdiction as to make the state accountable for a failure in that regard. But such instances rarely, if ever, occur. The freedom from external control left to the state is usually sufficient, in such cases, to leave full responsibility with the state.

There are, however, states which have been recognized as independent, and which are commonly discussed as full-sovereign states, but which are controlled to such an extent by other states as to relieve them of responsibility, in some cases, to third states. Excellent examples are to be found in the group of Caribbean states over which the United States exerts a degree of control. Cuba, for instance, has apparently been formally recognized as independent; but her liberty of action with regard to finances, certain treaties, and in other ways, is limited by her treaty with the United States.¹² A similar situation exists with regard to Panama,¹³ Haiti,¹⁴ San

de l'Europe (Paris, 1920), Vol. IV (Vers la Grande Guerre), p. 123. The present situation of Germany offers other examples. A relevant instance is the objection put forward by Germany, upon applying for membership in the League of Nations, against being bound by the military obligations of the Covenant, on the ground that her military capacity was limited by the Treaty of Versailles.

¹² Treaty of July 2, 1904, *Foreign Relations*, 1904, pp. 243-246: "Art. I. That the Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgement in or control over any portion of said island. . . .

"Art. III. That the Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba."

Article II provides that Cuba shall not contract a debt beyond the ordinary revenues of the Island.

¹³ Malloy, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and other Powers, 1776-1909* (Washington, 1910), II, p. 1349; *For. Rel.*, 1904, pp. 543-552; Fauchille, *Traité*, I, p. 271; Hall, *International Law*, p. 31; Hyde, *International Law*, I, § 20; Fenwick, *International Law*, p. 93.

Domingo,¹⁵ and Nicaragua.¹⁶ The responsibility of these states is unquestionably affected by the control which the United States exercises over them. As to this situation, Mr. Hyde says:

In proportion as the United States by virtue of these conventions exercises rights which they confer as a privilege peculiarly its own, and in which no foreign state is permitted to participate, it appears to assume internationally a certain responsibility for conditions of government within the territories concerned.¹⁷

Similarly, the action taken by one state toward another may result in a temporary control which arouses a question as to the location of responsibility. In the case of the *Brig General Armstrong*, the action of England in a Portuguese possession resulted in an injury to the United States. In this case, the demand for redress was addressed to Portugal.¹⁸ Such questions may arise from temporary military occupation. When American nationals in Holland were injured by the action of Napoleon I, France accepted responsibility for the damages done. The commissioners under the Convention with France decided that these claims constituted valid demands against France.¹⁹

¹⁴ For the Convention with Haiti, signed September 16, 1915, see *A. J.*, X (1916), Supplement, p. 234; or Treaty Series, No. 623. It is quoted in part by Dickinson, *Equality of States*, pp. 258-260. See also Willoughby and Fenwick, *Types of Restricted Sovereignty* (Washington, 1919), pp. 119-127; Hall, *International Law*, p. 31; Fauchille, *Traité*, I, pp. 265, 272; Hyde, *International Law*, I, § 22; Fenwick, *International Law*, p. 93.

¹⁵ The treaty, dated February 8, 1907, may be found in *A. J.*, I, Supplement, pp. 231-234. See also Hollander, "The Convention between the United States and the Dominican Republic," *A. J.*, I, p. 287; Fauchille, *Traité*, I, p. 272; Willoughby-Fenwick, *op. cit.*, pp. 112-119; Hyde, *International Law*, I, § 21; Fenwick, *International Law*, p. 93.

¹⁶ For the treaty, *A. J.*, X, Supplement, p. 260. See also Hyde, *International Law*, I, § 23, who says that the treaty did not reduce Nicaragua to a condition of subordination; and Hall, *International Law*, p. 31.

¹⁷ Hyde, *International Law*, I, p. 36. He quotes (*ibid.*, p. 32) a proclamation of the Department of State of December 24, 1924, announcing the "contemplated withdrawal of responsibilities assumed in connection with Dominican affairs." "The United States has thus acquired a privileged position in regard to these states entailing therewith certain international responsibilities," Hall, *International Law*, p. 31. In the recent Nicaraguan affair, one reason for the intervention of the United States, as reported in the papers, was the plea for protection of their nationals made by certain European Powers.

¹⁸ Moore, *A History and Digest of the International Arbitrations to which the United States has been a party* (Washington, 1898), II, p. 1071.

¹⁹ It was argued by Kane that "Holland was already a dependent kingdom and Louis a merely nominal sovereign. The treaty was a form; in substance it was an

§ 8. The authority enjoyed by the central government in a federal state is usually sufficient to direct responsibility to itself for any illegal act taking place within a member state. A federal state absorbs the international personality of its members to such a degree that it creates a new person at international law. It is commonly accepted among writers that a foreign state can not deal with the members of a federal state; and that the central government is unable to avoid responsibility on the plea of lack of control over its constituent parts.²⁰ While member states, under the federal constitution, may be given inviolable rights, the conduct of external affairs is commonly taken from their hands and placed with the central government. An injured foreign state, being unable to address itself to a constituent part of a federal state, must neces-

imperial decree," Moore, *Arbitrations*, p. 4473 *et seq.* According to Decencière-Ferrandière, *Responsabilité*, p. 194, this is the only case in which the responsibility of one state for another of this type is directly put. See also, Strupp, *Völkerrechtliche Delikt*, p. 115. Consider, however, the bombardment of Greytown by warships of the United States, and the rejection by the latter of claims made by France in behalf of her citizens who were injured, Moore, *Digest*, VI, p. 926.

²⁰ "Tout le monde reconnaît que, dans les rapports internationaux, l'État fédéral constitue un tout indivisible, chacun des États qui le compose s'étant absorbé en lui par un abandon complet de sa souveraineté externe, en ne conservant que son autonomie interne dont l'appréciation ne regarde pas les autres États . . . dans l'État fédéral l'unité est absolue au point de vue international. . . . Il serait d'ailleurs inadmissible que le réserve faite par chaque État fédéré de son autonomie interne allât jusqu'à lui permettre de se soustraire ainsi aux obligations internationales," Clunet, in *Journal du droit international privé* (hereinafter cited as *Clunet*), 18 (1891), pp. 1156-1157. The editor of the *Revue générale de droit international public*, XIV (1905), p. 666, in discussing the question of the Japanese students in California, says "à l'extérieur le pays est valablement représenté par son gouvernement, les dispositions d'ordre intérieur qui limitent ou définissent les pouvoirs de ce gouvernement n'ont pas de valeur internationale."

See, as to federal states: Donot, *De la responsabilité de l'état fédéral à raison des actes des états particuliers* (Paris, 1912), p. 7; Phillimore, *Commentaries*, I, p. 194; Fenwick, *International Law*, p. 95; Borchard, *Diplomatic Protection*, pp. 201, 226; Triepel, *Völkerrecht und Landesrecht*, p. 359 *et seq.*; de Visscher, *Responsabilité*, p. 105; Oppenheim, *International Law*, I, § 152; Strupp, *Völkerrechtliche Delikt*, pp. 27-29, 110; Hatschek, *Völkerrecht*, p. 387; Schoen, *Haftung*, p. 28, note 18, and pp. 100-107; Gammans, "The Responsibility of the Federal Government for Violations of the Rights of Aliens," *A. J.*, VIII, p. 78; Cahén, "Die amerikanische Union und die Einzelstaaten, namentlich in Bezug auf die kalifornische Frage," *Zeitschrift für Völkerrecht*, VIII (1914), p. 134; Despagnet, "Les difficultés venant de la constitution de certains pays," *R. D. I. P.*, II (1893), pp. 184, 195; *Annuaire de l'Institut de Droit International*, Règlement de 1900, XVIII, p. 254, translated in Ralston, *Venezuelan Arbitrations*, p. 734; Resolutions of 1927, Art. 9, Appendix III, *infra*; Decencière-Ferrandière, *Responsabilité*, p. 189.

Note also the following cases: *de Brissot*, Moore, *Arbitrations*, p. 2971; *Trumbull*, *ibid.*, p. 3569; *Wenzel*, Ralston, *Venezuelan Arbitrations*, p. 593; *Davy*, *ibid.*, p. 410; doctrinal note to *Eliza Case*, *Lapradelle-Politis, Recueil*, II, p. 276; *Clunet*, 1879, p. 413, 442.

sarily rely upon the central government to satisfy its claims. If the central authority within a federal state is empowered to speak for the nation, and yet not enabled to enforce its international obligations upon the member states, this incapacity must be regarded as a vice in the organization of the state, for which it must be held responsible if damage occurs therefrom.²¹

The United States has consistently refused to permit the federal organization of the respondent state to be offered as an excuse. Secretary Fish replied to such a plea from Brazil:

The reference of the claimant to the authorities of the province for redress will not be acquiesced in. These authorities can not be officially known to this government. It is the Imperial Government at Rio de Janeiro only which is accountable to this Government for any injury to the person or property of a citizen of the United States committed by the authorities of a province. It is with that Government alone that we hold diplomatic intercourse. The same rule would be applicable to the case of a Brazilian subject who, in this country, might be wronged by the authorities of a state.²²

While she has herself, in the past, pled her constitutional inability to control occurrences within her member states,²³ and sought thereby to evade responsibility, her arguments were in every case rejected by the claimant states, and indemnity was generally paid.²⁴

²¹ It is true, as some writers observe, that the constitutions of various federal states leave to their members a certain degree of international personality, such, for example, as the right of Swiss cantons to make certain kinds of treaties. Strupp, *Völkerrechtliche Delikt*, pp. 27-29, note 1; Decencière-Ferrandière, *Responsabilité*, p. 192. The standard of judgment must always be actual control; and it is believed that where such control does not reside in the central government, the state in question does not fall under the definition of a federal state.

²² Mr. Fish to Mr. Partridge, March 5, 1875, Moore, *Digest*, VI, p. 816. See also the opinion of Umpire Bunch in the *Montijo Case*, Moore, *Arbitrations*, p. 1439.

²³ This attitude has been taken in several mob cases in the past. See, for example, the answer made by Secretary Evarts to the Chinese Minister, with regard to the riots against Chinese in Denver, in 1880, *For. Rel.*, 1881, p. 319; Moore, *Digest*, VI, pp. 820-821. When Chinese were murdered at Rock Springs, Wyoming, the Chinese Minister pointed out that Wyoming was territory directly under federal control; and Secretary Bayard devoted two pages of long and involved argument to prove that the principle of non-liability applied even here, *For. Rel.*, 1886, pp. 159-161. Similar positions were taken in the *Tunstall Case*, Moore, *Digest*, VI, p. 663; and in various Italian cases, *For. Rel.*, 1891, p. 712; *ibid.*, 1901, p. 297; and note also the *McLeod Case*, Moore, *Digest*, VI, p. 261, II, p. 239.

²⁴ The Italian Minister, in protesting against the New Orleans riot of 1891, was severe: "We are under the sad necessity of concluding that what to every other government would be the accomplishment of simple duty is impossible to the Federal Government. . . . Let the Federal Government reflect upon its side if it is expedient

In the case of the New Orleans riot of 1891, liability was for the first time formally admitted; and, as Mr. Hyde points out, in the cases that have arisen since that time, the United States has ceased to plead its federal organization as a bar to liability.²⁵ There is, however, a deplorable need for legislation which would enable the Federal Government to fulfill its obligations toward aliens; and though most Presidents since Harrison have urged such legislation upon Congress, no action has been taken, and the Federal Government is still compelled to pay indemnities for the delinquencies of the states.²⁶

While it is possible to allocate responsibility with a fair degree of certainty in the case of federal states, from their very definition, it is much more difficult to do so with the novel and somewhat anomalous organization now known as the British Commonwealth of Nations. Responsibility must be measured by control unaffected

to leave to the mercy of each State of the Union, irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to entire countries," Telegram from Marquis Rudini, *For. Rel.*, 1891, p. 712. See also the vigorous Italian protest on the occasion of the fifth lynching of Italians at Erwin, Miss., in 1901, *For. Rel.*, 1901, p. 297.

²⁵ The note accompanying the indemnity to Italy for the riot of 1891 stated that it was the "solemn duty, as well as the great pleasure, of the National Government to pay a satisfactory indemnity," *For. Rel.*, 1891, pp. 727-728. See Lansing, in *Proc. Am. Soc.*, II, p. 46; Hyde, *International Law*, I, § 291.

²⁶ See the messages of Harrison, *For. Rel.*, 1891, p. vi; McKinley, *ibid.*, 1899, p. xxiii; Roosevelt, *ibid.*, 1906, xliii. There seems to be no doubt that the Constitution of the United States confers the necessary power upon Congress to pass legislation for this purpose, though Congress has not yet seen fit to use it, Fenwick, *International Law*, quoting *Texas v. White*, 7 Wall. 700, Wright, in *A. J.*, XVII, p. 239. Many constitutions expressly confer the authority upon the central government to protect aliens: Mexican Constitution, Art. 85, 111; Brazilian Constitution, Art. 34, cl. 11 and 12, and Art. 48, cl. 7, 8, 13, 16; Constitution of Argentine, Art. 67, cl. 19, 20, and Art. 86; Venezuelan Constitution, Art. 57, cl. 13, Art. 80, cl. 2, Art. 81, cl. 5. These may be found in Carranza, *Digesto constitucional americano* (Buenos Aires, 1910), I, pp. 91, 96, 37, 43, 208, 214, 219, 436, 440, 442. See also the new German Constitution, Arts. 6, 13, 14; and the new Austrian Constitution, Art. 10, b, and Art. 16, 2, McBain and Rogers, *The New Constitutions of Europe* (New York, 1922), pp. 177, 179, 258, 262.

There seems to be a disposition under present circumstances for the Department of State to attempt to pass the responsibility on to the states. "Either the State of Georgia must pay the claim, or the Federal Government must pay in its stead. The injury is the direct result of the wrongdoing of a state official, whom the Federal Government had no part in selecting and over whom it had no control. The obligation to assume the consequences of the unlawful act would seem to rest upon the State whose officer did the wrong and not upon the Federal Government—the people of all the States," Mr. Olney to the Governor of Georgia, February 9, 1897, Moore, *Digest*, VI, p. 740. See also the *Albano Case*, *For. Rel.*, 1914, p. 615; Count Sebastiani to Mr. Rives, June 15, 1831, Moore, *Digest*, VI, p. 810.

by outside interference; but it is difficult to locate control in the British Empire. Actually, no doubt, each Dominion has complete control within its own territories; but no Dominion has put forward a claim to technical independence under international law, nor has any ever been recognized as independent. The reservation of the right of the Crown to issue diplomatic credentials, and to consult on matters of foreign policy or war, apparently reserves to the central government at London a control which could result in responsibility; but it is apparently true also that a sufficient degree of internal control has been devolved upon the Dominions to justify their assuming responsibility for certain acts occurring within their respective territorial confines. A divided responsibility is not inconceivable under the criterion of actual control; and, in practice, it is doubtless true that each Dominion will accept responsibility for internationally injurious acts within its jurisdiction.²⁷

§ 9. The degree of subordination in which one state is held by another may be such as to relieve the former of a certain portion of its responsibility toward other states. Degrees of dependency of every conceivable sort may be found: indeed, to such an extent is this true that each case must be regarded as a separate one, dependent upon the agreement made. A certain degree of uniformity is provided for protectorates by the principle that they are subject to control in their foreign relations, but remain independent in their domestic affairs.²⁸ According to Hall, claimant states

are barred by the presence of the protecting state from exacting redress by force for any wrong which their subjects may suffer at the hands of the native rulers or people; that state must consequently be bound to see that a reasonable measure of security is afforded to foreign subjects and property within the protected territory, and to prevent acts of depredation

²⁷ See, as to the position of the British Dominions, Lewis, "The International Status of the British Self-Governing Dominions," *British Year-Book of International Law*, 1922-1923, p. 21; Rolin, "Le Statut des Dominions," *R. D. I. L. C.*, 1923, p. 201; Hall, *International Law*, p. 35 and note; Report of the Inter-Imperial Relations Committee of the Imperial Conference at London, November 20, 1926, *Current History Magazine*, January, 1927, p. 564. The practice of the British Government seems to give to the Dominions "a distinct, if limited international personality, though the mother-country remained responsible at international law for the fulfillment of their contracts," Fenwick, *International Law*, p. 100.

²⁸ "The one common element in Protectorates is the prohibition of all foreign relations except those permitted by the protecting state," *King v. the Earl of Crewe*, Law Reports, 1910, 2 K. B. 576, Evans, *Cases*, p. 60. See Westlake, *International Law*, I, p. 22; Hall, *International Law*, § 3a, at p. 150.

or hostility being done by its inhabitants. Correlatively to this responsibility the protecting state must have rights over foreign subjects enabling it to guard other foreigners, its own subjects, and the protected natives, from wrongdoing.²⁹

It would seem to be necessary, however, to judge each case upon its own merits. The relationship between protector and protected state is in each case a matter of treaty agreement; and the terms of the treaties vary.³⁰ It may be simply the direction of the foreign relations of a state, such as England assumed, with the agreement of Russia, over Afghanistan in 1907³¹; or it may go as far as the direction over internal affairs as well, as in the agreement between France and Tunis of June 8, 1883.³² If the arrangement leaves to the protected state the power to administer justice internally, that state would appear to have sufficient control to accept responsibility for injuries suffered by aliens therein. An attempt to enforce such a claim might, however, meet with interference from the protector state, in which case the latter would be expected to assume responsibility. As a matter of practical operation, the unwillingness of the protecting state to permit a claimant state to intervene for the protection of its rights may ordinarily be expected to result in the transfer of responsibility to the protector state for almost any injury occurring within the protectorate.³³ According to Mr. Hyde,

The large restraint imposed upon the inferior state serves to burden its superior with a proportional responsibility in the according of protection, and for the conduct of its ward.³⁴

²⁹ Hall, *International Law*, p. 150. Also, Anzilotti, in *R. D. I. P.*, XIII, p. 301; Rivier, *Principes*, I, p. 85; Strupp, *Völkerrechtliche Delikt*, pp. 114-115.

³⁰ "It may exist in all degrees, shading off imperceptibly from the relationship which imposes only slight limitations on the protected state to the so-called protectorate which has no international capacity at all. . . . Whatever its degree or its significance, it is generally agreed that it imposes a limitation upon the legal capacity of the protected state," Dickinson, *Equality of States*, p. 240.

³¹ 100 *British and Foreign State Papers*, p. 557.

³² *Nouveau Recueil Général*, 2nd Ser., IX, pp. 697-698.

³³ "The fact that the inferior state is not free to seek aid and alliance elsewhere will of itself impose on the superior the duty of protecting it against wrong, and the fact that outside states are not free in their choice of methods for seeking redress from the inferior will impose on the superior a responsibility for the wrongs committed by it," Westlake, *International Law*, I, pp. 22-23. See Mr. Sherman to Mr. Powell, January 11, 1898, Moore, *Digest*, VI, p. 475; Resolutions of the *Institut*, 1927, Art. 9, cl. 2, Art. 11, cl. 3, Appendix III, *infra*.

³⁴ Hyde, *International Law* I, § 15, p. 25.

Aside from protectorates, there may be found a great variety of other forms of dependency, impossible to classify. The breakup of the Ottoman Empire resulted in a confusion of forms of state organization, quite contrary, in some cases, to the usual principles of equality and independence. These vestigia of the power that was once the Turk's have usually been classified as vassal states; but this uncertain term leaves it impossible to draw a clear line of demarcation. By the Treaty of Berlin, for instance, Bulgaria was constituted an autonomous and tributary Principality under the suzerainty of the Sultan; yet she had the right to make war and treaties, she succeeded to the contracts made by the Ottoman Empire relative to her territory, she had the right of diplomatic representation, and her delegates were seated at the Hague Conference of 1899.³⁵ There would seem to be no doubt, in spite of her technical dependence upon Turkey, that Bulgaria was, during this stage, responsible for what occurred within her territories. On the other hand, Triepel asserts, with reason, that it was Austria, and not Turkey, which was responsible for incidents occurring within Bosnia-Herzegovina.³⁶ Similarly, while British courts have recognized the independence of certain Indian sovereigns, no third state would think of dealing with them except through England, and they have no international status whatever. In the *Adolph G. Studer Case*, before the American and British Claims Arbitration Tribunal, the award states that

The British Government appears in this proceeding by virtue of its assumption of responsibility internationally for the Government of Johore under the provisions of a treaty made in 1885.³⁷

Whatever the status of Morocco in 1908 and of Algeria in 1881, claims were addressed to the French Government for occurrences

³⁵ Willoughby-Fenwick, *op. cit.*, p. 22; Redslob, *Histoire*, p. 498; Dickinson, *Equality of States*, p. 238 and references in notes 1 and 2; Fenwick, *International Law*, p. 91.

³⁶ Triepel, *Völkerrecht und Landesrecht*, p. 336. The situation of Egypt with regard to England before 1914 may be compared, Strupp, *Völkerrechtliche Delikte*, p. 114.

³⁷ Nielsen's *Report*, p. 549. The immunity from jurisdiction of rulers of Indian states, because of their independence, was admitted by English courts in *Mighell v. Sultan of Johore*, Law Reports, 1894, 1 Q. B. 149, Evans, *Cases*, p. 205; and *Statham v. Statham and the Gaekwar of Baroda*, Law Reports, 1912, p. 92, Evans, *Cases*, p. 61.

within those territories in those years.³⁸ A stage lower in the classification, spheres of influence are found; but there does not appear to be sufficient control on the part of the interested state to justify imposing responsibility upon it for injuries suffered within such areas.³⁹

§ 10. There are, in addition to the above survey, certain political relationships unique and even anomalous in character which illustrate the increasing difficulty of determining the respondent party. The criterion of control, as laying the foundation for responsibility, is supported by the situation of the mandates created out of German territory at the end of the Great War.⁴⁰ It seems impossible to locate sovereignty in the mandatory state, or in the mandated community itself, or in the League of Nations.⁴¹ Regardless of this theoretical problem, the question of responsibility is clearly enough stated in the treaties. In the French mandate over the Cameroons, for example, it is provided that:

Art. 2. The Mandatory shall be responsible for the peace, order and good government of the territory and for the promotion to the utmost of the material and moral well-being and the social progress of its inhabitants. . . .

Art. 6. The Mandatory shall secure to all nationals of States Members of the League of Nations the same rights as are enjoyed in the territory by his own nationals in respect of entry into and residence in the territory, the protection accorded to their person and property, movable and immovable, and the exercise of their profession or trade, subject only to the requirements of public order and on condition of compliance with the local law. . . .⁴²

³⁸ See the *Casablanca Case*, Scott, *Hague Court Reports*, p. 110; and the *Saida* affair, *Archives diplomatiques*, 1882-3, Vol. 3, p. 57.

³⁹ "No jurisdiction is assumed, no internal or external sovereign power is taken out of the hands of the tribal chief; no definite responsibility consequently is incurred," Hall, *International Law*, p. 154. See also Rutherford, "Spheres of Influence: An Aspect of Semi-suzerainty," *A. J.*, XX, p. 300. According to Strupp, *Völkerrechtliche Delikt*, p. 61, note 1, each of the states sharing in a condominium shares responsibility.

⁴⁰ A similar situation is found in the General Act of the Berlin Conference of 1885, which required of any power taking control of territory in Africa a notification to other powers, and put upon it an obligation to maintain an authority sufficient to protect existing rights. See Hyde, *International Law*, I, § 102, p. 171.

⁴¹ Quincy Wright, "The Sovereignty of the Mandates," *A. J.*, XVII, p. 691.

⁴² Quoted in the Convention between the United States of America and France, Relating to the Part of the Cameroons under French Mandate, signed at Paris, February 13, 1923, *League of Nations Treaty Series*, Vol. 26, No. 640. By Articles 2 and 3 of this Convention, the United States is given the same rights in the mandate

While such provisions as these, in the mandates, would seem to lay responsibility quite clearly upon the mandatory, the facts that there are three different types of mandates, that disputes between a mandatory and other states with regard to the application of the mandate must be referred to the Permanent Court of International Justice, and that, finally, the mandatory is responsible to the League of Nations, raise some questions as to the procedure through which a claim should be presented. In the *Mavromattis Case*, Greece espoused the cause of one of her nationals in Palestine, and sued the mandatory, Great Britain, in the Permanent Court. On the other hand, some individual claims against Great Britain, arising in her African mandates, were appealed to the Mandates Commission, which applied the rule that local remedies must first be exhausted, but appeared to indicate a willingness to hear the case if the legislation acted upon by the local courts should not be in conformity with the principles of the Covenant or of the Mandate.⁴³

Such entities as the Free City of Dantzic and the Saar Basin defy classification. The division of control between various authorities renders it extremely difficult to locate responsibility, as was absurdly illustrated in the controversy over mailboxes in Dantzic.⁴⁴ The status of the Papacy has been much disputed; but the actual jurisdiction exercised by it would seem to be of such little importance as to render questions of responsibility of negligible interest. The League of Nations must be called *sui generis*, though efforts have been made to assimilate it to the status of a confederacy.⁴⁵ It, too, as at present constituted, can exercise only a negligible degree of control in its own name. Some writers concede inter-

as are Members of the League of Nations. Note also the statement made by the Director of the Mandates Section: "The Mandatory Powers had assumed a responsibility similar to that of a guardian to his ward . . . these Colonies were entrusted to certain Powers, subject to their securing equal opportunities for the trade and commerce of all the Members of the League, and subject, also, to their being responsible to the League," League of Nations, *Permanent Mandates Commission, Minutes of the First Session*, 1921, p. 4.

⁴³ League of Nations, *Permanent Mandates Commission, Minutes of the Sixth Session*, 1925, Annexes 6, 7, and 9.

⁴⁴ Decision of the Permanent Court of International Justice, *Polish Postal Service in Dantzic*, Series C, No. 8, Seventh Session.

⁴⁵ Cobbett, "What is the League of Nations," in *B. Y. I. L.*, 1924, p. 119; Hall, *International Law*, pp. 31-32; Fauchille, *Traité*, I, § 159²; Lawrence, *Principles*, p. 77.

national personality to public international unions and commissions; and, in a recent case at Washington, the Pan-American Union was granted the immunity from jurisdiction of a sovereign state.⁴⁶ The situation of *de facto* governments further illustrates the rule that responsibility depends upon control. According to Mr. Borchart,

A general government *de facto* having completely taken the place of the regularly constituted authorities in the State, binds the nation. . . . Its loans and contracts bind the State, and the State is responsible for the governmental acts of the *de facto* authorities;⁴⁷

and in the recent opinion of the Mexican Claims Commission, in the *Case of Geo. W. Hopkins*, the Commission said:

The binding force of such acts of the Huerta administration as partook of the personal character as contradistinguished from the Government itself will depend upon its real control and paramountcy at the time of the act over a major portion of the territory and a majority of the people of Mexico. . . . Once it had lost this control, even though it had not been actually overthrown, it would not be more than one among two or more factions wrestling for power as between themselves. Even while still in possession of the capital, and therefore dominating the foreign office, the treasury, and Mexico's representatives abroad, its acts of a personal nature could not ordinarily bind the nation from the moment it apparently was no longer the real master of the situation.⁴⁸

§ 11. Without entering into the controversy as to whether individuals may be considered as having an international personality, it may be observed that, in a very limited number of cases, the individual, rather than his state, may be held responsible for illegal

⁴⁶ Penfield, "The Legal Status of the Pan-American Union," *A. J.*, XX, p. 257. Hershey, *International Law*, p. 207, and Sayre, *Experiments in International Administration* (New York and London, 1919) concede international personality to such international unions and commissions.

⁴⁷ In *Yale Law Journal*, 26, p. 342.

⁴⁸ General Claims Commission, U. S. and Mexico, *Case of Geo. W. Hopkins*, Docket No. 39, Sec. 12; and see similarly Taft's award "In the matter of the Arbitration between H. M. the King of England and His Excellency, the President of the Republic of Costa Rica, October 18, 1923"; *Dreyfus v. Chile*, in Descamps et Renault, *Recueil international des traités du XXe siècle*, 1901, p. 396.

The *de facto* government must accept responsibility for its acts from the beginning if it succeeds, Ralston, *Law and Procedure*, pp. 343-344; *Thorington v. Smith*, 8 Wall. 1; *Cuculla Case*, Moore, *Arbitrations*, p. 2876; *Jeannotat Case*, *ibid.*, p. 3673; *Williams v. Bruffy*, 96 U. S. 176.

acts committed by himself. The most commonly quoted example of the individual's direct contact with international law is doubtless piracy. The state of which the pirate is a member is not held to account for his conduct, internationally illegal as it may be. The pirate is himself liable to the penalty, and any state may enforce it against him. Treaties have produced almost as universal an application of the rule for slave-trading; but this can not be regarded as customary international law. By the Washington Treaty of February 6, 1922, between the United States, the British Empire, France, Italy, and Japan, members of a submarine crew who violate the rules therein laid down are to be dealt with as if for an act of piracy.⁴⁹ Again, the individual may violate international law, and be held personally responsible therefor, by contraband carriage or blockade running.⁵⁰ For the most part, however, an individual's state must accept responsibility for his conduct, when he is within the control of his state; and while a tendency to expand the responsibility of the individual is discernible on the part of writers, it is rarely now that international law may reach him directly.

§ 12. It is manifest from the foregoing discussion that responsibility is not to be measured by formal classifications based upon equality or independence.⁵¹ Sovereignty, or independence, is clearly

⁴⁹ "Piracy includes acts differing from each other in kind and in moral value, but one thing they all have in common: they are done under conditions which render it impossible or unfair to hold any state responsible for their commission," Hall, *International Law*, § 81. See Heffter, *Droit international*, § 104; Bluntschli, *Völkerrecht*, Arts. 343 and 472; Phillimore, *Commentaries*, I, p. 411; Rivier, *Principes*, I, p. 248; Pradier-Fodéré, *Traité*, I, § 2491 *et seq.*; Dana's Wheaton, *International Law*, § 124.

Article III of the Treaty of Washington reads: "that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy, and may be brought to trial before the civil and military authorities of any Power within the jurisdiction of which he may be found." This treaty has not been ratified by France, and is not yet operative.

⁵⁰ Despagnet, *Cours*, p. 815; Hall, *International Law*, §§ 247, 264; Borchard, in *A. J.*, XX, p. 740; Hyde, *International Law*, II, p. 630, note 2, quoting from Moore.

⁵¹ "For international purposes, however, this classification is in great part immaterial. When it is proposed to place a community under the head of those which are capable of entering into some only of the relations which are contemplated by international law, the only questions which require to be settled are whether its independence is in fact impaired, and if so, in what respects and to what degree," Hall, *International Law*, p. 23. "Various forms of dependence are seen. While they differ greatly with respect to the extent and manner of the restraint imposed, it may

a relative term. The mere title to be called an independent state, though backed by such formal evidences as recognition, or the exercise of the so-called attributes of sovereignty, does not necessarily serve to locate responsibility. The actual amount of freedom from external control varies in almost every case, though it is true that a small group of the more important powers are so far free from external control that they may usually be held to complete responsibility, in the sense of responsibility for acts occurring within their territorial jurisdiction. States do not in practice determine the responsible person by reference to any accepted classification of full-sovereign and part-sovereign states, but by ascertaining the actual situation of the state in question, by reference to its actual freedom from external control. While it might be possible, at a given moment, to draw a line between those states which are responsible for practically all acts committed within their territories, and those entities for which other states must in some cases accept responsibility, it would not result in setting upon one side of that line all so-called full-sovereign states, and upon the other all so-called part-sovereign or dependent states. It is a line difficult to locate, and not, as is easily said, a clear demarcation between independence and dependence. It would be much easier to say that independence is measured by responsibility, and dependence by irresponsibility, than to say that responsibility is measured by what is usually called independence.

On the whole, practice is little affected by such relationships as above described, in the sense of difficulty in presenting or enforcing a claim. A state may be held responsible, as a subject of international law, only to the extent that it has rights and duties which it is free to exercise; and some have more than others. An organization which possesses any degree of international personality is presumed to be a responsible person at international law; and if its capacity is limited, it is usually by means of a formal agreement, which makes clear the necessary incidence of responsibility. While in principle a relation of dependency may transfer responsibility to the principal state, actually the relations established do not often affect situations or matters from which a responsibility might arise.

be doubted whether any classification indicates with precision useful distinctions of legal value," Hyde, *International Law*, I, p. 24. See also Dickinson, *Equality of States*, pp. 278-279; Fenwick, *International Law*, p. 353.

Internal administration of justice, from the insufficiency of which many claims arise, is usually left to the dependent state; and only if a question of physical enforcement arises is there any need to enquire as to an external control. Rarely does a protecting state have such control over individuals within the protected state as to devolve responsibility for their acts upon itself, or control over the protected state itself to such an extent as to prevent the latter from meeting its international obligations in practice. But while in practice it is true that a transfer of responsibility is rarely occasioned by a relationship of dependency which leaves existent any international personality whatever, it remains equally true that if one state controls another in any circumstances which might prevent the latter from discharging its international obligations, the basis of a responsibility of the protecting state for the subordinated state is laid. Responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control, or, conversely, the actual amount of control left, to the respondent state.

CHAPTER III

ACTS OF AGENTS

§ 13. Responsibility, it has been seen, is derived from the exclusive power which the state, as a sovereign power internally, is able to exercise; and this control extends, in differing degrees, to all persons within the territorial jurisdiction of the state, and to the agents who authoritatively represent the state, whether internally or externally. State responsibility may thus appear as a result of any one of the following four relationships: (1) State (agent) to state; (2) State (agent) to alien; (3) Individual to foreign state; (4) Individual to alien. Concerning the extent, and even the existence, of responsibility in these various situations there has been much dispute. By far the greatest number of cases has arisen under the second and fourth groups, those which involve injuries to aliens; and much has been written from the point-of-view of the alien. For this study, the viewpoint will be that of the state, considered first with regard to its responsibility for the acts of its agents, and later with regard to its responsibility for the acts of individuals within its territories, and for other more special situations.

Externally regarded, the state is an individual unity, speaking with one voice, even if through many mouthpieces. "Since the State is an abstract entity, it must, in order to find expression, provide itself with organs wherewith to exercise its powers."¹ The state can come into contact with other states only through individuals acting under its authority.² When the state invests such an

¹ League of Nations, *Committee of Experts for the Progressive Codification of International Law*, Questionnaire No. 4, "Responsibility of States for Damages Done in their Territories to the Persons or Property of Foreigners," p. 8 (hereinafter referred to as "*Committee for Progressive Codification, Responsibility*").

² "L'activité de l'État, c'est en définitive l'activité d'individus dûment autorisées par la loi. L'activité des agents de l'État étant l'activité de l'État, la violation du droit international qu'ils commettent constitue donc une violation commise par l'État lui-même," Anzilotti, in *R. D. I. P.*, XIII, p. 291. "... by the public authorities charged with their administration, and thus representing the state itself," *Yick Wo v. Hopkins*, 118 U. S. 356. See also de Visscher, *Responsabilité*, p. 91; Oppenheim, *International Law*, I, § 153; Decencière-Ferrandière, *Responsabilité*, p. 64; Schoen,

individual with its authority, his acts become the acts of the state itself, for which the state must accept responsibility under international law.³ The collective will of the state is, and must be, exercised through the individuals who act as its agents; and, although it may at times be difficult to distinguish between the state character of this individual and his own personal character, the presumption must always be that it is the state itself acting, through its agent. In the intricate modern life which circumscribes us, it is easily within the range of possibilities that the most insignificant agent of the state—a country constable or justice of the peace, a customs or a sanitary officer, even a forest guard—may through the exercise of his functions produce international complications giving rise to a claim against his state.⁴ It is conceivable, then, that the state may be forced to accept responsibility for the act of any of its agents.⁵

§ 14. Attempts have nevertheless been made to differentiate between "minor officials" and higher authorities, and to reject

Haftung, p. 43; Strupp, *Völkerrechtliche Delikt*, pp. 35 and 37 (where he criticizes Despaget, p. 782, for speaking of the acts of the state or of its agents); Borchard, *Diplomatic Protection*, p. 189; Heffter, *Le droit international*, § 198. But the state, as will be seen below, may be injured as a whole.

³ "When we speak of an illegal act committed by the State, we mean an act done by the organs through which the State performs its functions and which enable it to fulfill its international duties.

"Every one of these organs, whether it be legislative, administrative or judicial, can commit an illegal act contrary to the rights of another State, imputable to the State to which the organs belong, and consequently involving that State's responsibility," Committee for Progressive Codification, *Responsibility*, p. 6; and see p. 7. Also, *Massey Case*, General Claims Commission, U. S. and Mexico, Docket No. 352, § 18; *Venable Case*, *ibid.*, Docket No. 603, concurring opinion of Commissioner Nielsen, p. 37.

⁴ These are examples taken from actual practice. See Moore, *Digest*, IV, p. 635, for the case of a deputy-sheriff who was discharged for arresting an attaché of the Swiss legation; and p. 639 for that of a Justice of the Peace who decided "that the Spanish Minister is just as liable to answer in this court for the payment of debts as any other person." Many cases of claims arising from the acts of customs officials may be found in Moore, *Arbitrations*, p. 2872, and pp. 3361-3407. For the sanitary officer, *Clunet*, XIV (1887), p. 597.

⁵ Most writers admit, though in varying degrees, the responsibility of the state for the acts of all its agents. Schoen, *Haftung*, p. 43; Bar, *loc. cit.*, p. 472; Calvo, *Droit international*, § 1284; Benjamin, *Haftung*, p. 42; Anzilotti, in *R. D. I. P.*, XIII, pp. 286-287; de Visscher, *Responsabilité*, p. 94; Strupp, *Völkerrechtliche Delikt*, p. 42; Hall, *International Law*, p. 268; Oppenheim, *International Law*, I, § 157; Decencière-Ferrandière, *Responsabilité*, p. 65; doctrinal note in *Lacaze Case*, Lapradelle-Politis, *Recueil*, II, p. 301; Art. 1 of the Resolutions of the *Institut*, 1927, in Appendix III, *infra*; and the remarks (not yet printed) of M. Strisower, on August 25, 1927, in reply to the views advanced by M. Urrutia.

responsibility for acts of the former. This position is taken by Mr. Borchard, though with many qualifications.⁶ Much evidence, though displaying inconsistencies, is found in the practice of the United States and of Latin-America. Thus, the Mexican position in the *Bensley Case* was upheld by the arbitrators:

But, whether justifiable or otherwise, the acts complained of were committed by a municipal officer of the department for whose conduct the government of Mexico cannot be held responsible unless done by its authority. It would be an extraordinary position to assume under the law of nations that a government is liable to afford an indemnity for every injury which may result from the illegal or irregular acts of any of its subordinate municipal officers.⁷

A similar position was taken by the United States in the *Lewis Case*:

The United States were not responsible for the error of judgment of such subordinate officers until proper resort was had to some responsible and chief officer of the government, whose decision upon the question might bind the government.⁸

In later cases, this position is infrequently assumed, and is often denied. When Colombia argued that

no government is responsible for the acts of its agents or subalterns which are not in perfect accord with the faculties conferred upon them by the law or the instructions which the government itself may have given them,

Secretary Olney replied:

its conclusions of law are utterly at variance with well-established principles and cannot be seriously considered.⁹

⁶ "An examination of a great many cases confirms the view that as a general principle the state is not responsible for the wanton or unlawful acts of its minor officials, unless it has directly authorized, or, after notice, failed to prevent the act, or by failure to arrest, try, or punish the guilty offender, or to allow free access to its courts to the injured parties, it may be charged with actual or tacit complicity in the injury," Borchard, *Diplomatic Protection*, p. 189. He remarks (p. 185), "an examination of the cases shows the subject to be in the utmost confusion." See also his later restatement of the position in *A. J.*, XX, p. 743.

⁷ *Bensley Case*, Moore, *Arbitrations*, p. 3017.

⁸ Moore, *Arbitrations*, pp. 3019-3021. Mr. Hyde remarks of this case "the contention of the United States that local remedies should have been exhausted, was, it is believed, entitled to the approval of more than one commissioner (Frazer)," Hyde, *International Law*, I, p. 511, note.

⁹ Señor Holguin to Mr. McKinley, November 10, 1896, Moore, *Digest*, VI, p. 780; Mr. Olney to Mr. Sleeper, February 4, 1897, *ibid.*, p. 781.

The United States has often claimed liability for the acts of soldiers;¹⁰ and when Dr. Shipley was assaulted and robbed by a policeman in Smyrna, Turkey was forced to apologize.¹¹ The distinction between minor and superior officials is not found in European practice.¹² Bismarck did not hesitate to pay an indemnity for the killing of Brignon, a Frenchman, by a German forest guard; or to accept responsibility for the arrest of the French police officer, Schnaebeler.¹³ Nor is such a distinction evident in the Fourth Hague Convention of 1907, which requires of a belligerent that it shall be responsible for "all acts committed by persons forming part of its armed forces."

A survey of the cases reveals that other elements than the position or rank of the agent are of importance in determining state responsibility for his acts.¹⁴ It is to be observed that in a very large number of the cases in which the decision seems to reject liability on the ground that the acts were committed by minor officials, the opinion speaks of the failure of the claimant to avail himself of recourse to the local courts. Thus, in the *Caroline B. Slocum Case*:

The case of *Caroline B. Slocum v. Mexico*, No. 798, is another of those where complaint is made of the conduct of inferior authorities. . . . With regard to the conduct of the prefect in ordering the imprisonment of the claimant, she had it in her power to proceed against him in a higher court and to hold him to account for it, if it was illegal.

¹⁰ For examples, Moore, *Digest*, VI, § 1009. The problem of responsibility for acts of soldiers will be taken up *infra*, § 20.

¹¹ *For. Rel.*, 1903, pp. 733-734. The agent of the United States asserted that this was a mild course to pursue, and that the dismissal of the offending officer might well have been demanded.

¹² "Dabei macht es keinen Unterschied ob die (landes) rechtswidrige Handlung von einem höheren oder niederen Staatsorgan begangenen wurde. Der Polizist, der einen Exterritorialen verhaftet, macht den Staat nicht weniger verantwortlich wie das Staatsoberhaupt, das eine völkerrechtswidrige Massnahme trifft," Strupp, *Völkerrechtliche Delikt*, pp. 39-41. He cites a number of cases, among them the *Panther*, *R. D. I. P.*, XIII, p. 200; *Dogger Bank*, *ibid.*, XII, pp. 161, 351; *Arménie*, *ibid.*, IV, p. 623; *Père Salvator Lilli*, *ibid.*, IV, p. 541.

¹³ *R. D. I. L. C.*, XX, p. 222.

¹⁴ "It may be observed again that the inferiority of rank of the official is not decisive of the character of his conduct, or of the responsibility of the state for the consequences thereof," Hyde, *International Law*, I, p. 510. Mr. Hyde adds in a foot-note, "arbitrators have oftentimes lost sight of this fact, even when they have correctly denied redress for the misconduct of petty officials in cases where local remedies have not been exhausted," and refers to the *Bensley* and *Leichardt Cases*, Moore, *Arbitrations*, pp. 3017 and 3133.

But the umpire is of opinion that the Mexican Government cannot be held responsible for such acts of inferior authorities. . . .¹⁵

Again, in the *Smith Case*:

the claimant ought to have endeavored to obtain justice and damages against the judge from a higher Mexican court of justice, and that the Mexican Government can not be held responsible for the illegal acts of inferior judicial authorities when no appeal has been made to a higher court.¹⁶

In view of the fact that so many of these opinions refer to the rule of local redress, there seems very good ground for stating the proposition in the following terms: if damages were denied in these cases, it was not because the injury was caused by a minor official, for whom the government was not responsible, but because local remedies had not been exhausted; and if damages were awarded, in the case of such inferior authorities, it was usually because of the insufficiency, or failure in operation, of these local remedies. It is easy to confuse reasons when considering these

¹⁵ Moore, *Arbitrations*, p. 3140. In the recent *Case of El Emporio del Cafe, S. A.*, it was said: "Neither does the mere fact that the occupation had been directed by the President of the United States, whose action was approved by the Congress, affect the question presented, for in determining the jurisdiction of this Commission the rank, be it high or low, of the national authorities whose acts are made a basis for complaint is immaterial," General Claims Commission, U. S. and Mexico, Docket No. 281, March 2, 1926. "The Umpire is of the opinion that the Mexican Government cannot be held responsible for the losses occasioned by the acts of an inferior judicial authority, when the complainant has taken no steps by *judicial means* to have punishment inflicted upon the offender and to obtain damages from him," *Blumhardt Case*, Moore, *Arbitrations*, p. 3146.

In addition to the cases cited elsewhere in this Section, attention may be directed to the following: from Moore, *Arbitrations*, Dorris, p. 3002; *Ophir*, p. 3045; *Scott*, p. 3389; *St. Croix*, p. 3391; *Harriet*, p. 3395; *Eclipse*, p. 3397; *Phare*, p. 4870; *de Zeo*, p. 693; *Bronner*, p. 3134; *Selkirk*, p. 3130. From Ralston, *Venezuelan Arbitrations*, Lalanne and Ledour, p. 501; *Poggioli*, p. 847. From La Fontaine, *Pasicrisie, Case of Lavarello* (Italy v. Portugal), p. 411; *Italy v. Persia*, p. 342. *Margaret Roper*, General Claims Commission, U. S. and Mexico, Docket No. 183, §§ 4-5; *Gertrude Parker Massey*, *ibid.*, Docket No. 352, § 6, especially § 18; *Francisco Quintanilla*, *ibid.*, Docket No. 532.

¹⁶ Moore, *Arbitrations*, p. 3146. Of this case Dr. Hyde says: "Thus in the foregoing case, when the learned Umpire declared that Mexico was not 'responsible' for the 'illegal' acts of inferior judicial authorities in the absence of an appeal to a higher court, he doubtless sought to express the opinion that no absolute duty rested upon that State to respond in damages until the aggrieved alien himself had exhausted his local remedies. The Umpire did not intend to suggest that the commission of an illegal act by an official of whatsoever rank failed to impose upon Mexico a duty to afford a means of redress," Hyde, *International Law*, I, p. 492, note 3.

cases. What actually happens, in most of them, is that the arbitrator refuses to admit them to his tribunal because the claimants are unable to prove the necessary prerequisite—that they have exhausted local remedies. This, however, is not to deny the existence of responsibility, which appears at the moment an internationally illegal act is committed by an agent of the state. There is merely denied to the claimant a certain procedure in pressing his claim—the right of diplomatic interposition. And it happens that local remedies are more often provided against lower than against higher officials of a state, with the result that claims against such minor officials are more often rejected by international tribunals. Such differentiation as apparently exists between subordinate officials and those higher in rank is not one as to responsibility, but as to procedure. Practice does not justify the conclusion that no responsibility exists for injurious acts by inferior officials of the state: it merely reveals the fact that, due to domestic legislation, local remedies may more often be found against the acts of minor officials, and less frequently against those of superior officials.¹⁷

The foregoing discussion serves also to explain the apparent variance in American and European practice. International law permits to each state its own organization, and its own methods of providing internal redress; and the efficient operation of these methods serves frequently to discharge the responsibility of the state, and to prohibit diplomatic claims. Since the codes of the various states differ, it follows that the procedure of handling an injury by a state agent will vary. The administrative law systems of European states, offering special protection to state officers, have come to acknowledge responsibility for their actions, to a large and increasing degree. Anglo-American practice, on the other hand, holds the agent personally liable for his acts, and denies responsibility on the part of the state for them. The fact that international law accepts the dispositions of domestic law in either case results in the necessity of seeking redress against the officer in Anglo-American countries; while European states are more inclined to

¹⁷ Neither international law nor American law makes any distinction as to the position of the agent (except for Senate approval of Presidential appointments). "As a general rule the power of the head of the State and of Cabinet ministers and higher officials to involve the State in responsibility is tested in the first instance by municipal law," Borchard, *Diplomatic Protection*, p. 183. See *U. S. v. Lee*, 106 U. S. 196.

accept responsibility on the part of the state.¹⁸ In either case, however, it is not a question of the rank of the agent, but of the possibility of securing redress for his acts through domestic agencies.

§ 15. While states are exceedingly circumspect in their dealings with each other, it occasionally happens that one state is directly injured by the action of another state, because of the action of an agent of the latter. A large number of such cases arise from violations of the territorial sovereignty of another state. For the seizure of the *Florida* in a Brazilian port, the United States announced that it would court martial the officer responsible for the seizure, dismiss the consul who advised it, and salute the Brazilian flag at the spot where Brazilian neutrality had been violated.¹⁹ In an interesting recent case, the Council of the League of Nations was called upon to decide as to a conflict between Greece and Bulgaria, in which each state charged that troops of the other had violated its territory. The Council, having sent a commission to the spot to untangle the complicated evidence, acted upon the principle that reparation must be made for the unjustified violation of territory, and imposed damages of 20,000,000 levas upon Greece.²⁰ Interventions must often be regarded as breaches of territorial inviolability,²¹ and any attempt to exercise jurisdiction in a foreign state, such as making an arrest,²² or the exercise of administrative

¹⁸ "Some states, such as the United States and various countries of Latin America, denying all responsibility for torts of officers and remitting the injured individual solely to his action against the officer, and other states, such as France and Germany, assuming a large measure of responsibility for its officers' official acts, but denying liability for his personal acts," Borchard, *Diplomatic Protection*, p. 189.

Writers upon the subject of responsibility either deny the distinction between higher and lower officials, or else fail to consider it in this light at all. The theoretical objection to such a differentiation lies in the fact that a state could evade responsibility by alleging that the act complained of was that of an inferior official and not properly authorized by the law of the state. See Anzilotti, in *R. D. I. P.*, XIII, p. 289; de Visscher, *Responsabilité*, p. 94; Triepel, *Völkerrecht und Landesrecht*, p. 358; Strupp, *Völkerrechtliche Delikt*, pp. 36-37; Schoen, *Haftung*, p. 50.

¹⁹ Moore, *Digest*, II, p. 367. The *Case of the Panther* is similar, *R. D. I. P.*, XIII, p. 200. Other such cases may be found in Moore, *Digest*, II, §§ 209-220.

²⁰ League of Nations, Report of the *Commission of Enquiry into the incidents on the Frontier between Greece and Bulgaria*, November 28, 1925. In the quarrel between Greece and Italy of 1923, a difficult problem was presented by the Italian seizure of Corfu. For the answer of the Committee of Jurists appointed by the League to consider whether this seizure was legal or not, see the *Official Journal* of the League, V, p. 523. It is quoted in note 50, p. 92, *infra*.

²¹ See, as to interventions, Moore, *Digest*, VI, Chapter XIX; Hyde, *International Law*, I, §§ 69-85; Stowell, *Intervention in International Law* (Washington, 1921).

²² *Case of Arrestures*, Moore, *Digest*, II, p. 373; and generally in § 211.

functions, may arouse protest.²³ An important source of complaint is to be found in acts which show a failure of respect, or do insult, to a foreign state.²⁴ For the breaking of a treaty, a state may of course be held responsible—*pacta sunt servanda*; and with this duty that of paying the debts owed to other states may perhaps be analogously considered.

The injury done by state to state represents international responsibility *par excellence*. When a state has been injured by the official action of another state, in the person of its agent, responsibility is immediate, and the procedure is direct, between state and state. Only rarely is the rule of local redress applicable in such cases. The injured state may be willing to accept as sufficient reparation for the injury done it a disavowal of the act, or the operation of local measures, such as the dismissal of, or judicial measures against, the offending agent; but it is not prohibited from using diplomatic procedure before local remedies have been attempted, as is true in so many other cases. For any official act in derogation of the rights of a foreign state *qua* state, the latter is free to take it up at once.

§ 16. A state agent may act in one of three positions. He may (1) act as the state: that is, under and within the authority given to him by the national law, and thus fairly representing the will of his state, as expressed through the machinery which his state has provided. Or he may (2), while acting as an agent of the state, exceed the powers given to him by law, thus raising a question as to whether his act is truly that of the state, since the state has not authorized it. Finally, he may (3) act as an individual, his actions being entirely irrelevant to the functions which he is commissioned to perform, though perhaps made possible by the powers conferred upon him in the office which he holds. Since the state can only exercise its functions through human agents, a threefold question

²³ "The umpire having found that the requirement of import duties before clearance was an unlawful exaction and a wrongful assumption of Venezuelan sovereignty in Brazil, it is just and right, and therefore justice and equity, that these duties be restored to the claimant company," *Case of Compagnie Générale des Asphaltes de France, Ralston, Venezuelan Arbitrations*, p. 330. See Moore, *Digest*, II, § 175; Hyde, *International Law*, I, p. 348.

²⁴ Many examples of such lack of respect, as attacks upon its head, its ambassadors, its flag, etc., may be seen in Eagleton, "The Responsibility of the State for the Protection of Foreign Officials," *A. J.*, XIX, p. 293.

arises concerning these agents.²⁵ The difficulty consists in resolving an individual personality into those elements which go to represent the state, and those which make up the individual himself. It is necessary to distinguish between various acts of the same person, labeling some of them as acts of the state, and denying political character, or proper authority, to others. The problem is no longer one of the position or rank of the individual agent, but the question of which of his acts brings responsibility upon his state under international law.

§ 17. In the first situation, there would appear to be little room for debate. If the agent has acted within the authority given to him by his state, his act is a state act, for which the state is unquestionably responsible, if it has done injury to the rights of another state under international law.²⁶ To argue that the lawgivers are unable to foresee the illegal acts which they have made possible for their agents, and that responsibility exists only when the acts of such agents have been approved by the highest authorities, would be equivalent to suppressing, in most cases, the right to reparation. When an agent of the state acts within the authority conferred

²⁵ One may conceive of a fourth possibility: that of the agent who, without exceeding the powers conferred upon him, abuses them. It is believed, however, that the cases found in international practice of this type may be assimilated into the third group.

A different classification, employed by Anzilotti and followed by Strupp (*Völkerrechtliche Delikt*, p. 38) and Decencière-Ferrandière (*Responsabilité*, pp. 67-68) may be found in *R. D. I. P.*, XIII, p. 288.

²⁶ The conclusions offered by the League of Nations Committee of Experts on this point read as follows:

"3. A State is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the State was bound under international law to perform, and inflicted by an official within the limits of his competence, subject always to the following conditions:

"(a) If the right which has been infringed and which is recognised as belonging to the State of which the injured foreigner is a national is a positive right established by a treaty between the two states or by customary law;

"(b) If the injury suffered does not arise from an act performed by the official for the defence of the rights of the State, except in the absence of contrary treaty stipulations;

"The State on whose behalf the official has acted cannot escape responsibility by pleading the inadequacy of its laws."

Quoted by the Committee for Progressive Codification, *Responsibility*, p. 25.

"When, however, an agent of a State acting within the scope of his authority commits an internationally illegal act with respect to an alien, there is a denial of justice on the part of the State, and its responsibility is established," Hyde, *International Law*, I, p. 493. "L'activité des agents de l'État étant l'activité de l'État, la violation du droit international qu'ils commettent constitue donc une violation commise par l'État lui-même," Anzilotti, in *R. D. I. P.*, XIII, p. 291.

upon him by law, he is manifesting, by virtue of this law, the will of his state; and his act becomes the act of the state itself, bringing responsibility upon the state.²⁷

If, as is usually asserted, the sovereign state cannot be sued,²⁸ it would seem to follow that for injurious acts by agents within their competence direct diplomatic procedure would be proper for the presentation of the claim. Local redress being impossible because of the impossibility of suing the state, no other recourse would be left to the injured state than such diplomatic action. As a matter of fact, however, states do to an increasing degree, allow themselves to be sued; and when they do so for acts of agents within their competence, resort must be had to the local means of redress provided.²⁹ Such a position has been taken for the acts of port authorities,³⁰ police agents,³¹ judicial authorities,³² damage by pub-

²⁷ "The responsibility of a government for the acts of its administrative officials, injuriously affecting the rights of aliens, is beyond question," *Gage Case*, Ralston, *Venezuelan Arbitrations*, p. 165. "On these facts, the question arises: Is there any liability on His Britannic Majesty's Government? In our opinion the answer to this question is in the affirmative. The consignment of the material to Bloemfontein was a wrongful interference with neutral property. It was certainly within the scope of Mr. Harrison's duty as railway storekeeper to forward material by rail, and he did so under instructions which fix liability on His Britannic Majesty's Government," American and British Claims Arbitration Tribunal, *Case of the Union Bridge Co.*, January 8, 1924, *A. J.*, XIX, p. 218. "But the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for," *Case of Maal*, Ralston, *Venezuelan Arbitrations*, p. 916; and see the *Cases of Lalanne and Ledour*, Ballistini, and *Metzger*, *ibid.*, pp. 501, 503, 578; and of *Beales*, *Noble and Garrison*, Moore, *Arbitrations*, p. 3563.

"Der Staat hat nur gehandelt wenn sein Organ innerhalb der ihm staatsrechtlich gezogenen Kompetenzgrenzen gehandelt hat," Schoen, *Haftung*, p. 44; and see Hall, *International Law*, § 65; Moore, *Digest*, VI, § 999; Anzilotti, *Teoria*, p. 165.

²⁸ "A sovereign can not be sued in his own courts without his own consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty. . . . Hence, a citizen of one nation, wronged by the conduct of another nation, must seek redress through his own government," *U. S. v. Diekelman*, 92 U. S. 520, 524, Moore, *Digest*, VI, p. 651.

²⁹ "The United States is not disposed to intervene when it appears that he can obtain redress by any local process, directed either against the territorial sovereign or the officials made by the local law responsible for the injuries sustained," Hyde, *International Law*, I, p. 505; and see p. 510.

³⁰ "Subsequently, however, on being advised that the owner had not only failed to secure the recognition of his claim for damages by the Government at Ottawa, but that he had also been informed by the minister of customs, on the strength of an opinion of the minister of justice, that he had no redress in the courts against any officer of the Crown, the Department presented the claim to the British Government," *Case of the Bridgewater*, Moore, *Digest*, VI, pp. 668-669. See *Case of the Rebecca*, *ibid.*, VI, p. 666; and opinion of the Attorney General, *ibid.*, VI, pp. 657-658.

³¹ Mr. Buchanan to Mr. Pakenham, December 6, 1846, Moore, *Digest*, VI, p. 659;

lic ships,³³ and in other cases; and there seems to be no reason why the rule should not apply to the acts of the chief executive himself, if means of action are provided against him.³⁴ The general bearing of this rule, as applied to acts of agents, was stated by Secretary Fish in the following terms:

A claim against a foreign government, based on misconduct of its domestic officials, must be presented to the judicial department of such government when such department is fairly organized and has jurisdiction of the case.³⁵

§ 18. The authority of an agent is measured by the scope of the powers conferred upon him by his own state.³⁶ The limits of this authority are oftentimes found in no document, and may be difficult to determine with exactness. By implication, his powers within his office are large; and if, in exercising them, he does injury, it is not unreasonable for the injured state to interpret them broadly, and to seek to hold his state responsible for his act. If an agent is negotiating a treaty or other agreement, his authority should be carefully investigated by the state with whom he is dealing: his state could hardly be held to account for an obvious excess upon his part against which the other state could easily guard itself. The power of agents to enter into contractual arrangements with other states is usually defined with sufficient clarity, and for such acts beyond their authority the state may not usually be held responsible.³⁷

Mr. Fish to Mr. Warren, February 26, 1875, *ibid.*, VI, p. 661; *Tunstall's Case*, *ibid.*, VI, pp. 662-666; *Case of Oberlander and Messenger*, *ibid.*, VI, p. 671; and § 1010 in general. Also, Moore, *Arbitrations*, p. 3235 (*Baldwin*); p. 3243 (*Hannum*).

³³ Mr. Clay to Mr. Tacon, February 5, 1828, Moore, *Digest*, VI, p. 652; Mr. Evarts to Mr. Fairchild, January 17, 1881, *ibid.*, VI, p. 656; Mr. Marcy to Chevalier Bertinatti, December 1, 1856, *ibid.*, VI, p. 748; Mr. Davis to Mr. Chase, January 10, 1870, *ibid.*, VI, p. 750; *Jonan Case*, Moore, *Arbitrations*, p. 3251.

³⁴ *Case of the Lanie Cobb*, Moore, *Digest*, VI, p. 757.

³⁵ *U. S. v. Lee*, 106 U. S. 196; Borchard, *Diplomatic Protection*, § 71, p. 175.

³⁶ Moore, *Digest*, VI, p. 660. On the same page: "The Department of State can not take cognizance of claims which are cognizable by the judicial tribunals of the United States," Mr. Seward to Lord Lyons, January 12, 1863.

³⁷ See, for example, the *Case of the Fair American*, Moore, *Arbitrations*, pp. 3370-3371. "Ora le norme giuridiche per le quali la volontà e l'azione individuale si tramutano in volontà ed azione dello stato sono norme de diritto interno," Anzilotti, *Teoria*, p. 165. See Borchard, *Diplomatic Protection*, p. 183; Strupp, *Völkerrechtliche Delikte*, p. 36; Schoen, *Haftung*, p. 44.

³⁸ Mr. Borchard cites a number of such cases, *Diplomatic Protection*, p. 183, and p. 299. There are exceptions. In the *Trumbull Case* the umpire said: "Whether the

But for other acts of agents, of a non-contractual nature, in excess of the authority conferred upon them, states are regularly accountable according to international practice. The *Brignon Case*, above cited, offers an illustration; and Germany again accepted responsibility in the case of the *Panther*.³⁸ Innumerable cases may be cited in which, as Mr. Borchard says,³⁹ government liability is "predicated upon the mere malfeasance or non-feasance of officers upon whom a distinct governmental duty was incumbent." In the case of the *Canada*, whose escape from shipwreck was prevented by the interference of Brazilian officers, the United States put forward her claim even though these officers had acted in excess of their powers, and an award was made for the loss of the ship.⁴⁰ Damages have often been paid for the unlawful conduct of customs or port authorities, naval and military commanders, police agents, and others.⁴¹ On the other hand, quotations may often be

honorable minister of the United States exceeded his authority in entering into the contract with Mr. Trumbull is a question that, for the purposes of the demurrer, is of no importance. As a representative of the United States he made, as is confessed by the demurrer, a promise in the name of his government which, according to the rules of responsibility of governments for acts performed by their agents in foreign countries, can not be repudiated," Moore, *Arbitrations*, p. 3569. This case Borchard designates as exceptional, *op. et loc. cit.* A similar case was decided in the same manner by the American and British Claims Arbitration Tribunal; but an important element in this case was the implicit approval by the United States of its consul's action, *Hemming Case*, Nielsen's *Report*, p. 620-623. See *Davies Case*, General Claims Commission, United States and Mexico, Docket No. 1232.

A possible explanation of the divergence from the usual rule of responsibility in these cases lies in the ability of the injured state to guard itself against an abuse of the agent's power.

³⁸ "Comme nos enquêtes nous donnent la preuve que les militaires ont transgressé les ordres qui leur avaient été donnés, le gouvernement impérial déclare que les coupables après enquête sont soumis à la justice militaire et exprime son vif regret au gouvernement brésilien de ce qui s'est passé," *Panther Case*, R. D. I. P., XIII, p. 200.

³⁹ Borchard, *Diplomatic Protection*, p. 186.

⁴⁰ Moore, *Arbitrations*, p. 1733; Lapradelle-Politis, *Recueil*, II, p. 622. Note also the *Cases of Jennie L. Underhill*, Ralston, *Venezuelan Arbitrations*, pp. 49-51; *Parrot*, Moore, *Arbitrations*, p. 3009; *Arménie*, R. D. I. P., II, p. 624; *Brignon*, R. D. I. L. C., XX, p. 222; *Salvatore Lilli*, R. D. I. P., IV, p. 541; *Lacaze*, Lapradelle-Politis, *Recueil*, II, p. 297; *Margaret Roper*, General Claims Commission, U. S. and Mexico, Docket No. 1283; *Francisco Mallén*, *ibid.*, Docket No. 2935; *Thomas H. Youmans*, *ibid.*, Docket No. 271, Sec. 13; *Francisco Quintanilla*, *ibid.*, Docket No. 532; *Swinney*, *ibid.*, Docket No. 130.

⁴¹ Mr. Borchard discusses cases of this sort in exhaustive fashion, *Diplomatic Protection*, p. 183 *et seq.*

Modern writers upon the subject of responsibility are in practically complete agreement that the state is responsible for the acts of its agents, even in excess of their powers. Thus M. de Lapradelle, in a doctrinal note upon the *Affaire Lacaze*, speaks of "la possibilité pour un fonctionnaire de commettre un acte illicite au préjudice

found to the effect that there is no responsibility for agents acting out of the range not only of their real but of their apparent authority.⁴² It is believed that confusion has arisen here because of the failure to distinguish between responsibility in principle and the procedure through which it is discharged.

While a state is in principle responsible for acts of its agents whether authorized or not, a differentiation must be made as to the procedure by which the claim is presented, or by which reparation is made. The responsibility of the state may be discharged either by the efficient operation of its own domestic machinery of redress, where such is provided, or where it is lacking or fails in operation, by redress from state to state, pecuniary or otherwise. Application must always be made to local courts or authorities for redress if such redress is provided by local law; and only where it is lacking or fails is diplomatic interposition in order.⁴³ The denials of responsibility mentioned at the end of the preceding paragraph appear to imply that responsibility does not appear until

d'un étranger, en se prévalant de sa qualité officiel, est intiemment liée à l'organisation même de l'État, qui, vis-à-vis des autres nations, a le devoir absolu d'empêcher que ses fonctionnaires abusent de leurs pouvoirs, et s'ils en abusent, de répondre des dommages qui en résultent," *Recueil*, II, p. 302. Note also Strupp, *Völkerrechtliche Delikt*, pp. 35, 40-41; Schoen, *Haftung*, p. 46; de Visscher, *Responsabilité*, p. 92; Borchard, *Diplomatic Protection*, p. 188; Anzilotti, in *R. D. I. P.*, XIII, p. 289; Oppenheim, *International Law*, I, p. 216; Resolutions of the *Institut*, Art. 1, Appendix III, *infra*.

⁴² See Moore, *Digest*, VI, § 1000. Of these statements M. de Lapradelle says: "En dépit des affirmations contraires contenues parfois dans les documents diplomatiques [citing the reference just given to Moore's *Digest*] l'usage constant des nations a consacré la responsabilité internationale de l'État à raison des actes dommageables de ses agents alors même que ces actes sont contraires aux lois ou entachés d'excès de pouvoir," *Recueil*, II, p. 301.

⁴³ The rule of local redress will be fully discussed in Chapter V. It must necessarily be mentioned in advance, since the failure to comprehend its function is the cause of confusion in the allocation of responsibility in various groups of cases. See Section 14, *supra*. In illustration of the particular point here raised, the following may be quoted: "It is alleged that the marine court exceeded its power. . . . Supposing this to be a correct view of its proceedings, its acts are absolutely void, and both the court and the parties who instituted the proceedings are personally responsible for their illegal acts," Mr. Marcy to Chevalier Bertinatti, December 1, 1856, Moore, *Digest*, II, p. 748. Similarly, Mr. Bayard to Mr. West, June 1, 1885, *ibid.*, VI, p. 742. On the other hand, if local laws are not provided, or do not operate properly, diplomatic interposition is justified: "as the officer who did the wrong was not under bond, and there is no assurance that judgment against him would avail the complainant, the matter is not one which can be relegated to the courts," Mr. Olney to the governor of Georgia, February 9, 1897, *ibid.*, VI, p. 740. See also the *Cases of McKenzie*, *ibid.*, VI, p. 747; and of *Wheelock*, *ibid.*, VI, p. 769; *Affaire Lacaze*, Lapradelle-Politis, *Recueil*, II, p. 303.

local redress has failed.⁴⁴ Such statements do not witness a proper understanding of the significance of local redress. Responsibility exists from the moment in which the internationally injurious act has been committed; the part played by local redress is purely procedural. It may serve, if successful, as complete reparation; or, if it fail, as permitting an appeal from local remedies to diplomatic interposition. But this does not affect responsibility, which is already in existence.

There is ample justification in theory for the practice of holding states responsible for the unauthorized acts of their agents. It is not necessary to suggest, as does Hatschek,⁴⁵ that there is here a reversion to medieval group solidarity; nor to say, as do Anzilotti and Strupp,⁴⁶ that a contrast is apparent between *Rechtslogick* and *Völkerrecht*. For, even though it be granted that the unauthorized act of the agent does not express the will of the state, it is none the less the act of the state; nor does it follow, even if it should be no act of the state, that the state would therefore have no responsibility for it. Again it must be said that the state is responsible for all acts of an internationally illegal character occurring within its reach, because of the exclusive control which it is authorized to exercise. Externally, the act of the agent is the act of the state. This is the logical consequence of the proposition that the

⁴⁴ Thus the Committee for Progressive Codification of International Law says: "4. The State is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an official acting outside his competence as defined by the national laws, except in the following cases: (a) If the Government, having been informed that the official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act; (b) If, when the act has been committed, the Government does not with all due speed take such disciplinary measures and inflict such penalties on the said official as the laws of the country provide; (c) If there are no means of legal recourse available to the foreigners against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws." Questionnaire on *Responsibility*, p. 15, *A. J.*, XX, Special Number, p. 202. It would be more correct to say: "Diplomatic interposition is not justifiable . . ." than to say "The State is not responsible. . . ." See Article 12 of Resolutions of the *Institut*, 1927, Appendix III, *infra*. In the discussion on August 30th, the text was changed from "The state is not responsible," to "No demand for reparation may be introduced."

⁴⁵ Hatschek, *Völkerrecht*, p. 388.

⁴⁶ "Un vero e proprio contrasto. . . . Due cose si possono ritenere per certe: la prima, che un atto di questo genere non è in alcun modo un atto dello Stato, ma un puro atto individuale; l'altra, che il diritto internazionale positivo afferma in modo non dubbio la responsabilità dello stato per i fatti illeciti dei funzionari, anche quando sono stati compiuti illegalmente e fuori della rispettiva competenza," Anzilotti, *Teoria*, p. 167. See Strupp, *Völkerrechtliche Delikt*, p. 39.

state acts only through its organs, as also of the principle under which the state is left free to make its own internal arrangements. The state, having this right, puts the agent into a position of power which he may abuse; and since no other state may invade its territorial jurisdiction, it must accept responsibility for the protection of other states against its agents, whether within their powers or not. The assumption must be that, when a state has clothed an agent with its authority, his acts become its acts, even though wrongful ones.⁴⁷ International intercourse would exist upon a most precarious basis if a state were allowed to evade its obligations by asserting that the agent had exceeded his powers under domestic law.⁴⁸ The state may, however, claim that its law provides ample redress, and therefore that it should be permitted to discharge its responsibility through its own agencies.

§ 19. When the act of an agent of the state is clearly an individual one, irrelevant to his function as an official of the government, redress must be sought against him as a private individual.⁴⁹ There have been a few cases in which the responsibility of the state was affirmed immediately upon the establishment of the fact

⁴⁷ Schoen, *Haftung*, pp. 47-48 and notes; Borchard, *Diplomatic Protection*, pp. 189, 198; Triepel, *Völkerrecht und Landesrecht*, pp. 348-349; Anzilotti, *Teoria*, pp. 166, 177. Strupp says that the presumption that the agent has acted within his powers is a *praesumptio iuris et de iure*, *Völkerrechtliche Delikte*, p. 44.

⁴⁸ "Le droit interne qui limite l'autorité des différents fonctionnaires n'est pas opposable aux autres États et la sécurité des relations internationales exige qu'un acte qui, par ses caractéristiques extrinsèques, est un acte de État, engage comme tel la responsabilité de celui-ci," Decencière-Ferrandière, *Responsabilité*, p. 70. See similarly, Lapradelle-Politis, *Recueil*, II, p. 303.

⁴⁹ "The detention of the boy seems to have been a wanton trespass committed by the governor, under no color of official proceedings, and without any connection with his official duties. For the damages resulting from this unauthorized act he was individually responsible to the claimant, and it does not appear that ample redress might not have been obtained by a resort to the judicial tribunals of the country," *Bensley Case*, Moore, *Arbitrations*, p. 3018. In the *Case of the Rebecca*, a judge, after selling a ship, disappeared with the proceeds, *ibid.*, p. 3008; in the *Case of Hayes*, it was pointed out that "the contract was made by Chew in his own name, and, so far as appears on the face of it, for his own benefit," *ibid.*, p. 3457. "It was not a case of collateral misconduct dictated by private malice, in which case the Peruvian Government might disclaim responsibility," Mr. Frelinghuysen to Mr. Phelps, December 5, 1884, Moore, *Digest*, VI, p. 759. See the *Henriques Case*, Ralston, *Venezuelan Arbitrations*, p. 910; *Mallén Case*, General Claims Commission, U. S. and Mexico, Docket No. 2935, Sec. 4.

"It seems clear that for personal acts of local or minor officials plainly outside of their authority and not incidental to their functions, the officer alone and not the Government is responsible," Borchard, *Diplomatic Protection*, p. 190; and see Strupp, *Völkerrechtliche Delikte*, pp. 41-43.

that the individual who did the injury was an official of the state;⁵⁰ and an investigation for this purpose might reveal the existence of some classes of officials for whose acts, in any case, responsibility is direct.⁵¹ Possibly, too, a greater degree of diligence is due from the state in guarding against the acts of its own officials than against those of private citizens.⁵² But it will usually be found to be true that such personal acts are treated as acts of individuals. They do not in themselves constitute international illegalities; and no responsibility appears until negligence or denial of justice on the part of the state is established.

§ 20. Having studied the acts of agents with regard to rank and competence, it will be profitable next to consider them from the viewpoint of function. For convenience, they may be classified as administrative, legislative, and judicial.

Administrative officials naturally come most often into contact with international law, or with other states; and their especial position with regard to external relations is usually recognized by domestic law and practice.⁵³ It has been shown that the state may

⁵⁰ "The responsibility of the Government for the acts of its administrative officials, injuriously affecting the rights of aliens, is beyond question," *Gage Case*, Ralston, *Venezuelan Arbitrations*, p. 165. "The Government of Chile is responsible to the United States for the spoliation of property belonging to citizens of the United States by officers of Chile," Mr. Everett to Mr. Carvallo, February 23, 1853, Moore, *Digest*, VI, p. 741. See also the following note.

⁵¹ See, for instance, Borchard, *Diplomatic Protection*, pp. 186-187, as to customs officers; and pp. 188-189 as to police officers. As to these, refer to § 20, *infra*.

⁵² "We shall therefore place these cases in a higher category than unlawful acts committed by individuals who are not officials. Acts of private persons and acts of officials who exceed their powers are alike private acts, but we consider that the vigilance exercised by the State should be more strict in the latter case," Committee for Progressive Codification, *Responsibility*, p. 8, *A. J.*, XX, Special Number, p. 188.

⁵³ Witness the decision of the Swiss Federal Council, February 2, 1923: "Il est impossible d'accorder au juge de mettre sa propre conception à la place de celle des pouvoirs qui sont seuls appelés à exprimer une volonté autorisée en cette matière . . ." *Bulletin de l'Institut Intermédiaire International*, July, 1923, p. 31. That the American courts must execute the decisions of the political department even if in conflict with international law, see Wright, in *A. J.*, XVII, p. 234; and that a foreign state has the right to accept the act of an executive agent as binding even if Congress does not act accordingly, Wright, *Control*, p. 59.

Some authors assert that the state is liable only for those agents who represent it externally, Liszt, *Völkerrecht*, § 25, II and III; Pradier-Fodéré, *Traité*, I, § 201; Rivier, *Principes*, I, p. 411; Oppenheim, *International Law*, I, p. 255 (who admits a "vicarious" responsibility otherwise). Other writers do not admit such a limitation, de Visscher, *Responsabilité*, p. 94; Anzilotti, in *R. D. I. P.*, XIII, p. 291; Schoen, *Haftung*, pp. 36, 50; Strupp, *Völkerrechtliche Delikt*, p. 38; Benjamin, *Haftung*, p. 10; Doctrinal note, Lapradelle-Politis, *Recueil*, II, p. 300, note. The former position would logically be taken by those who do not admit responsibility until

normally be held to account for all acts of an internationally illegal character committed by an agent within the line of his duty;⁵⁴ and the real difficulty in cases involving administrative agents is the question of how redress shall be made, rather than of responsibility in principle. Here, as elsewhere, a confusion is found between substantive responsibility and procedural methods.

Abuse by police officers has been a frequent cause of complaint. An alien must, of course, submit to the jurisdiction of the country within which he finds himself; and, where the proceedings are regular, according to the laws of that country, no objection can be raised if he is arrested. Claims have, however, often been made for false or irregular arrest, or for maltreatment or undue detention.⁵⁵ Such claims, it will be found, have usually been directed toward states in which the administration of justice is irregular or unsatisfactory. The United States has frequently refused to admit or press claims originating in the actions of police officials until local redress has been denied.⁵⁶ Ordinarily, it would appear, in

a diplomatic claim is presented. As has been seen, however, responsibility appears not merely when state takes up claim with state, but from the moment the illegal act is committed.

⁵⁴ "The responsibility of the nation for acts of government organs imposes a duty upon every organ to abstain from action in violation of a law or treaty," Wright, *Control*, p. 161.

⁵⁵ See *For. Rel.*, 1916, pp. 918-923, for the *Case of Ralph Davis*, bayoneted by police at Panama; and p. 924 for similar occurrences at Colon. Other cases are: *Prat*, Moore, *Arbitrations*, p. 3280; *Baldwin*, *ibid.*, p. 3235; *Gahagan*, *ibid.*, p. 3240; *Barnes*, *ibid.*, p. 3247; *Cabias*, *ibid.*, p. 3253; *Edwards*, *ibid.*, p. 3268; *Story*, *ibid.*, p. 3269; *McKeown*, *ibid.*, p. 3311; *Powers*, *ibid.*, p. 3274; *Francisco Mallén*, General Claims Commission, U. S. and Mexico, Docket No. 2935; *Margaret Roper*, *ibid.*, Docket No. 183; *Walter H. Faulkner*, *ibid.*, Docket No. 47; *Francisco Quintanilla*, *ibid.*, Docket No. 532; *J. W. and N. L. Swinney*, *ibid.*, Docket No. 130; *Nick Cibich*, *ibid.*, Docket No. 14; *Mary Ann Turner*, *ibid.*, Docket No. 1327. These were for oppressive treatment in arrest or imprisonment. Also, *Rahming*, Moore, *Arbitrations*, p. 3283; *Nautilus*, *ibid.*, p. 3251; *Moliere*, *ibid.*, p. 3253; *Sartori*, *ibid.*, p. 3120; *Walter H. Faulkner*, General Claims Commission, U. S. and Mexico, Docket No. 47; *Harry Roberts*, *ibid.*, Docket No. 185; *Leonard E. Adler*, *ibid.*, Docket No. 363; *Russell Strother*, *ibid.*, Docket No. 3088; these cases being for undue detention by police. Also, *Jennie L. Underhill*, Ralston, *Venezuelan Arbitrations*, p. 51; *Topaze* (in which the umpire quotes eighteen such cases), *ibid.*, p. 329; *Giacomini* (in which fourteen others are cited), *ibid.*, p. 765; *Wheelock*, Moore, *Digest*, VI, p. 769; *Walker*, *ibid.*, p. 770; *Pfbaum*, *ibid.*, p. 771.

⁵⁶ "Under the laws of Great Britain, a remedy exists for those who have been subjected to unlawful arrest; and citizens of the United States as well as subjects of Great Britain . . . are entitled to avail themselves of that remedy in the regular ordinary courts of justice. The same rule exists and is enforced in the United States with reference to the subjects of Great Britain," Mr. Bayard to Mr. Gebhard, September 9, 1885, Moore, *Digest*, VI, p. 279. See also *ibid.*, VI, § 1010; Mr. Buchanan to Mr. Pakenham, December 26, 1846, *ibid.*, VI, p. 659; Mr. Fish to Mr. Ruger,

countries in which the administration of justice measures up to the standards set by the community of nations, redress for injuries emanating from police officials must be sought in local courts before a diplomatic claim will be allowed. A similar situation is found with regard to port and customs officials, for whose injurious acts diplomatic claims have often been presented, even in the absence of any effort to pursue judicial remedies.⁵⁷ Here again the majority of cases to be found are in states whose administration of justice is notoriously irregular, and in which arbitrary and illegal conduct is habitual. In such states, unsatisfactory local remedies may not unreasonably be disregarded. In spite of the inconsistencies of practice, due to this situation, it is correct to say that, on principle, a state must be given the opportunity to redress in its own courts the injuries done by its agents where such remedies are provided and measure up to the international standard.⁵⁸

Injuries resulting from the acts of soldiers present a difficult problem. Article III of The Hague Convention of 1907 concerning the Laws and Customs of War on Land holds a state responsible "for all acts committed by persons forming part of its armed forces." Whether this rule would apply in time of peace as well as in war is doubtful.⁵⁹ According to Mr. Bayard:

The position of this Government is that while a Government is responsible for the misconduct of its soldiers when in the field, or when acting either actually or constructively under its authority, even though such conduct has been forbidden by it, it is not responsible for collateral mis-

October 21, 1869, *ibid.*, VI, p. 660; Mr. Fish to Mr. Warren, February 26, 1875, *ibid.*, VI, p. 661; *Oberlander and Messenger Case*, *ibid.*, VI, p. 670. Both the United States and Great Britain have, however, paid damages for false imprisonment, *Cases of Lillywhite and Hatheway*, *ibid.*, VI, § 1011.

⁵⁷ In the following cases, local remedies were either not suggested or not sought, but an award was nevertheless made: From Moore, *Arbitrations*, *Sheldon Lewis*, p. 3019; *Industry*, p. 3045; *Hammond*, p. 3241; *Only Son*, p. 3404; *Wm. Lee*, p. 3405; *Phare*, p. 4870; *Havana Packet*, p. 5036. From Ralston, *Venezuelan Arbitrations*, *Monnot*, p. 171; *Lalanne and Ledour*, p. 501; *Ballistini*, p. 503; *Alliance*, p. 29. Note also the episode at Tampico, as a result of which the United States demanded that Mexico salute her flag, *A. J.*, VIII, p. 579.

⁵⁸ "Even if, however, his [the official's] act may be justly regarded as internationally illegal, the obligation of the territorial sovereign to make reparation through the diplomatic channel is, on principle, contingent upon its failure to afford the claimant an adequate means of redress through a remedy either against the offender or against the State itself, when for any reason the prosecution of an action against the former would appear to be without value," Hyde, *International Law*, I, p. 510.

⁵⁹ *Ibid.*, p. 531.

conduct of individual soldiers, dictated by private malice. But the mere fact that soldiers, duly enlisted and uniformed as such, commit acts "without orders from their superiors in command" does not relieve their Government from the liability for such acts.⁶⁰

A distinction has been made in various ways between acts of soldiers in the presence of an officer, and those performed when detached from their command. In the latter case, they are apparently upon the same footing as ordinary individuals committing crimes.⁶¹ If the injury is committed while in the line of duty, or in the presence of an officer, the test of liability appears to be negligence or improper trial.⁶² The position of the soldier is exceptional; but, roughly speaking, he is, like other agents, liable personally for his personal acts; and he brings responsibility upon the state only when his act is clearly authorized, or when the officers above him have been negligent in their supervision over him.

The possibilities of local recourse against higher officials of the state are apt to be limited. For such persons as the head of the state, or his ministers, ambassadors, or naval or military commanders, there is rarely any question as to the responsibility of the state. A question may occasionally arise as to the power of such agent to bind the state by a contract;⁶³ but aside from contractual matters,

⁶⁰ Mr. Bayard to Mr. Buck, October 27, 1885, Moore, *Digest*, VI, p. 758.

⁶¹ "It is probably true that acts of pillage committed by soldiers absent from their regiments and not under the direct command of their officers do not affect the responsibility of their governments, and that such acts are regarded as common crimes," *Case of Irene Roberts, Ralston, Venezuelan Arbitrations*, p. 142.

⁶² In the opinion of the American and British Claims Arbitration Tribunal in the *Case of the Zafiro*, a number of cases with regard to the presence of officers is discussed. The conclusion of the tribunal was that it was culpable negligence on the part of the captain to permit his crew to go ashore at a time when pillage was certain, *A. J.*, XX, p. 389. Honduras was forced to pay an indemnity of \$10,000 for the shooting of Pears by a sentinel, on the ground of gross negligence and failure to prosecute, Moore, *Digest*, VI, pp. 762-764. For the careless shooting of Etzel during target practice, China paid the United States \$25,000, cashiered the district commandant, and put the soldiers responsible in jail for five years, *ibid.*, VI, p. 765. See, for further information on this point, Moore, *Digest*, VI, § 1009; Moore, *Arbitrations*, pp. 2992-3008; Hyde, *International Law*, I, § 296; Borchard, *Diplomatic Protection*, § 80; *Case of Thomas H. Youmans*, General Claims Commission, U. S. and Mexico, Docket No. 271, November 13, 1926, § 14; *Garcia and Garza*, *ibid.*, Docket No. 292, December 3, 1926; *Stephens and Stephens*, *ibid.*, Docket No. 148, July 15, 1927. In the *Falcon Case*, *ibid.*, Docket No. 278, the United States was held responsible for the wrongful act of a soldier, with no discussion as to the presence of an officer.

⁶³ In the *Case of Beales, Noble and Garrison*: "by the constitution of Venezuela the lawful and undisputed government of that country could not, by its executive

the higher agents of the state may be regarded as normally expressing its will, and bringing responsibility upon it. Many complaints have arisen because of the acts of diplomatic agents, or military or naval officers.⁶⁴ For such acts, if internationally injurious, responsibility must be admitted, though the claimant state may be satisfied with disavowal or apology, and not demand pecuniary indemnity. But here also, if local remedies may be found, such, for example, as the Court of Claims, the injured alien must attempt to secure reparation from them before calling upon his state for diplomatic aid.

§ 21. "The legislature," says Mr. Borchard, "is an organ of the state for whose acts the state is directly responsible."⁶⁵ While internally the acts of the legislature may be locally enforceable, externally such acts may, if contrary to international law, involve the state in responsibility. It is therefore the first duty of the state to see that its codes and statutes are not in conflict with international law. A state can not evade responsibility under the plea that its legislation is a sovereign act. A municipal law which is contrary to a treaty, or to established rules of customary international law, does not eliminate responsibility, but, on the contrary, fixes it.⁶⁶ This has often been demonstrated in the practice of states. In arguing the *Cutting Case*, the United States said:

department alone, have granted the power in question, and therefore the grant by Paz was without lawful authority, even if the *de facto* character of his government had been established," Moore, *Arbitrations*, p. 3563. In *Underhill's* case Mexico was bound by a debt made by her principal military commandant, *ibid.*, p. 3433. "It is probable that a lease signed by a diplomatic representative of a foreign government would bind his government," Borchard, *Diplomatic Protection*, p. 187. See note 37, pp. 54-55, *supra*.

⁶⁴ For illustrative cases, see Eagleton, "The Responsibility of States for the Protection of Foreign Officials," *A. J.*, XIX, pp. 293-314; Moore, *Digest*, II, § 256; Borchard, *Diplomatic Protection*, § 78 and references therein.

⁶⁵ Borchard, *Diplomatic Protection*, p. 181.

⁶⁶ See the opinion of Umpire Plumley in the *Aroa Mines Case*, in which he cites many attempts to interpose municipal laws as obstacles to responsibility. At page 378 the Umpire says: "By a proper application of the usually accepted rules of international law governing such commissions, controlling courts, and defining the diplomatic conduct of nations there could be no question that national laws must yield to the law of nations if there was a conflict," Ralston, *Venezuelan Arbitrations*, pp. 344, 362, 365, 378. In the *Gentini Case* the Umpire (Ralston) sustained the American contention that "it has never yet been held in international tribunals that a claim brought before them could be defeated by reason of the existence of a statute of this sort, such statute having no authority whatsoever over international courts," *ibid.*, p. 725; and see Ralston, *Law and Procedure*, § 141 *et seq.*

"Such a law can not control the action or duty of his government, for govern-

. . . if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations, or to adduce precedents in its support.⁶⁷

An English court was as emphatic in the recent case of the *Baron Stjernblad*:

It is quite impossible for a Prize Court administering international law to accept the dictates of any municipal law. . . .⁶⁸

ments are bound among themselves only by treaty or by the recognized law of nations," Mr. Frelinghuysen to Mr. Soteldo, April 4, 1884, Moore, *Digest*, VI, p. 321. "Such an acquiescence would imply an acknowledgment on our part that by municipal laws the Mexican Government can deprive citizens of the United States of their rights under treaties and international law, a pretension which can not be allowed to any government," Mr. Fish to Mr. Foster, July 15, 1875, *ibid.*, VI, p. 310. See also Mr. Olney to Mr. Dupuy de Lome, February 17, 1896, and the reply of Mr. Dupuy de Lome, *ibid.*, VI, p. 317; General Claims Commission, U. S. and Mexico, *North American Dredging Co. Case*, Sec. 8; *Landreau Case*, A. J., V, p. 233, quoted in Ralston, *Law and Procedure*, p. 100; American Institute of International Law, Project No. 4, Article 4, A. J., XX, Special Number, p. 304.

"L'autorité du droit international est supérieure à celle du droit national, supérieure même à la prétendue tout-puissance du législateur," Pillet, "Les Droits Fondamentaux des États . . .," R. D. I. P., V, at p. 82; and see p. 87. De Visscher, *Responsabilité*, p. 95; Borchard, *Diplomatic Protection*, p. 181; Hyde, *International Law*, § 267; Decencière-Ferrandière, *Responsabilité*, p. 81.

"Mr. Bayard to Mr. Connery, November 1, 1887, Moore, *Digest*, II, p. 235. "The measure of a neutral's obligation is to be found in the rules of international law, and it can not shelter itself by the allegation that its own legislation imposes a laxer standard on its subjects," Mr. Moore, summarizing from Papers relating to the Treaty of Washington, *Digest*, VII, p. 878. "Our own statutes bind only our own Government and citizens. If they impose upon us a larger duty than is imposed on us by international law, they do not correspondingly enlarge our duties to foreign nations, nor do they abridge our duties if they establish for our municipal regulation a standard less stringent than that established by international law," Mr. Bayard to Mr. Hall, February 6, 1886, *ibid.* See Pinckney's opinion in the *Case of the Betsey*, Moore, *Arbitrations*, p. 3183. Mr. Wright, commenting upon the Chinese Exclusion Cases, declares that "the United States Supreme Court recognized that those laws, though valid in municipal law, were no defense in international law," Wright, *Control*, p. 17; see also p. 162, and Mr. Wright's article in A. J., XVII, at p. 235.

⁶⁸ Grant, *Prize Cases*, III, p. 22. In the *Consul Corfitzon* the same court said: "a Court of Prize cannot be properly deterred from making what it conceives to be the appropriate order because a neutral claimant would, if he obeyed the order, be

Not even a constitution is able to prevail against international law, and its operation may bring responsibility upon the state.⁶⁹ When Peru pleaded irresponsibility for the acts of the dictator Pierola on the ground of a constitutional provision, The Hague Court replied that such a law could not be opposed to the international rights of aliens.⁷⁰ The United States has constantly maintained this position in arguing her claims against other states; and has admitted it in claims against herself.⁷¹ Thus, reparation was

guilty of a breach of his own municipal law," *ibid.*, p. 8. See *Cases of the Hakan, Law Reports* (1918) A. C. 148, *Evans, Cases*, p. 695; *Zamora, Law Reports* (1916) 2 A. C. 77, *Evans, Cases*, p. 621. "His Majesty's Government have already pointed out that each country determines for itself that procedure which its prize courts shall adopt; but certainly under the British system—and His Majesty's Government were under the impression that, in this matter, the United States had taken the same course—the substantive law which the court applies as between captor and claimant consists of the rules and principles of international law, and not the municipal legislation of the country. If reference is made to the *Case of the Recovery* (6 C. Rob. 341), it will be seen that Lord Stowell refused to enforce in the Prize Court against a neutral the British Navigation Laws," Memorandum to the Secretary of State, April 24, 1916, *A. J.*, X, Supplement, p. 138.

When Portugal, in the days of Choiseul, attempted to change the order of precedence, the French Minister replied: "no sovereign in a matter of this kind recognizes powers of legislation in the person of other sovereigns. All Powers are bound to each other to do nothing contrary to usages which they have no power to change," Satow, *A Guide to Diplomatic Practice* (London, 1922), I, p. 30.

For attempted municipal limitations under what is known as the Calvo Doctrine, see § 33, *infra*.

⁶⁹ "The King cannot compel the Chambers, neither can he compel the Courts; but the nation is none the less responsible for the breach of faith arising out of the discordant action of the international machinery of its Constitution," Mr. Wheaton to Mr. Butler, January 20, 1835, *re French Spoliation Claims*, Wharton, *Digest*, I, p. 36. "The creator of these methods and means of internal administration, viz., the nation, must always be responsible to the other government for the creatures of its creation," Plumley, Umpire, in the *Davy Case*, Ralston, *Venezuelan Arbitrations*, p. 411. "In such case a treaty is superior to the Constitution which latter must give way," *Montijo Case*, Moore, *Arbitrations*, p. 1440; and see *De Brissot Case*, *ibid.*, p. 2971.

"Constitutional arguments do not prevail to excuse the non-performance of international duties," Borchard, *Diplomatic Protection*, p. 201. "It is, therefore, no valid excuse for failure to perform an international duty to assert that the government's authority is limited by constitutional provisions, for the sovereign's responsibility is not limited," Lansing, in *Proc. Am. Soc.*, II, p. 45. "A little reflection will, however, indicate that international law, if it exists at all, must limit a state's constitution-making capacity," Wright, in *A. J.*, XVII, p. 240. See Pillet, *op. cit.*, *R. D. I. P.*, V, p. 86; Diena, *Diritto internazionale*, I, p. 410; Despagne, "Les difficultés venant de la constitution de certains pays," *R. D. I. P.*, II, p. 190.

⁷⁰ Descamps et Renault, *Recueil des traités de XXe Siècle*, 1901, pp. 393-399.

⁷¹ See note 69, *supra*. The United States has, in the past, attempted to evade liability because of her federal organization under the Constitution; but this is no longer done. See *Case of McLeod*, Moore, *Digest*, II, pp. 24-25; *New Orleans Riot*, 1891, *ibid.*, VI, § 1026. In the *Trumbull Case*, while the United States denied responsibility, the award was against her, Moore, *Arbitrations*, p. 3569.

offered to France for issuing a subpoena *duces tecum* to her consul Dillon; nor have constitutional limitations interfered with consular immunities.⁷²

The responsibility of the state for legislative omissions is perhaps more often encountered than for positive legislation contrary to international law. A great portion of international law needs municipal law for its proper enforcement; but it is not dependent upon the presence of such legislation. Where international obligations have been definitely fixed by international law, the municipal law must enforce them, or else the state must accept liability for its failure.⁷³ The United States has based claims upon this principle;⁷⁴ and her courts have so interpreted her law.⁷⁵ Many arbi-

⁷² For the *Dillon Case*, Moore, *Digest*, V, pp. 78-81. In this case, Mr. Marcy argued that "The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other," *ibid.*, p. 167. In spite of this argument, the United States apologized and agreed to salute the French flag. The United States court, however, reversing its first opinion, avoided the Constitutional conflict by stating that the sixth amendment was intended only to place the accused in the same position in making his defense as the government occupied in endeavoring to establish his guilt, *ibid.*, p. 79. Since then treaties have been carefully framed to avoid this conflict, Hyde, *International Law*, I, p. 808, n. 3. Mr. Wright suggests a number of cases in which constitutional guarantees have not interfered with the execution of treaties, Wright, *Control*, p. 37, and in *A. J.*, XVII, p. 243; and see Hyde, *loc. cit.*, p. 759.

⁷³ See the discussion of Baron Marschall's objections by Renault, *Actes et Documents, Deuxième Conférence de la Paix*, I, p. 468; Bar, *loc. cit.*, p. 472; Wright, *Enforcement*, Ch. IV, p. 67; Strupp, *Völkerrechtliche Delikt*, pp. 59-60; de Visscher, *Responsabilité*, p. 97; Hall, *International Law*, p. 230. "It is a fundamental principle that the legislation of a state must be such as to fulfill its international duties," Borchard, *Diplomatic Protection*, p. 214.

⁷⁴ See, for example, her argument in the *Alabama Claims, Argument of the United States* (Paris, 1872), pp. 27, 35, 377; and note 76, *infra*. "Although a foreign treaty is, by the Constitution of the United States . . . the supreme law of the land, yet generally it does not execute itself, but requires some legislation, especially under a republican form of government, to carry it into effect," Mr. Seward to Mr. Men- dez, June 28, 1879, Wharton, *Digest*, II, p. 71. Various Presidential messages have urged upon Congress the necessity of legislation to enable the Federal Government to protect its obligation in such affairs as that of the New Orleans mob: "I renew the urgent recommendations I made last year that Congress appropriately confer upon the Federal courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved, and I invite action upon the bills to accomplish this which were introduced in the Senate and House. It is incumbent upon us to remedy the statutory omission which has led, and may lead again, to such untoward results," President McKinley, annual message, Moore, *Digest*, VI, p. 847.

⁷⁵ "A right secured by the law of nations to a nation is one the United States as the representative of this nation are bound to protect. Consequently a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively. . . . The United States must

tral decisions bear witness to the principle;⁷⁶ as do also acts passed by states to remedy such deficiencies of legislation.⁷⁷

The state, then, may be held responsible either for positive acts of legislation in contradiction to international law, or for the failure to provide legislation necessary in order to fulfill its international obligations. And it is to be observed that the very fact that there is no municipal responsibility for legislative acts makes international responsibility the more direct.⁷⁸ That is to say, since there is no possibility of local redress against the legislature of the state, upon the one hand, and since, on the other hand, the absence of necessary laws renders local redress equally impossible, diplomatic representations are at once in order; and only by state to state procedure and reparation can the claim be presented and responsibility discharged. For no act of the state, through any of its agencies, may responsibility be more immediately pressed than for those of its legislative body.

§ 22. The judicial department usually occupies a peculiarly independent position in the organization of the state. Municipally speaking, the judge is not liable, ordinarily, for mistakes which he

have power to pass it and enforce it themselves or be unable to perform a duty which they may owe to another nation and which the law of nations has imposed upon them as part of their international obligations," *U. S. v. Arjona*, 120 U. S. 487.

⁷⁶ "And whereas the government of Her Britannic Majesty can not justify itself for a failure in due diligence on the plea of insufficiency of legal means of action which it possessed," Geneva Award, Moore, *Digest*, VII, p. 1061, Lapradelle-Politis, *Recueil*, II, 969 and references in note 1. "It is well known that these injuries arise from either an act of positive and direct violation of the rights of the injured, or from the condemnable neglect of extending the necessary protection to said rights," *Case of Salvador Prats*, Moore, *Arbitrations*, p. 2892; and see *Montijo Case*, *ibid.*, p. 1444; *Montano Case*, *ibid.*, p. 1630; *de Brissot Case*, *ibid.*, p. 2971.

⁷⁷ The classic example of such action is the famous Act of Anne, passed by England in order to prevent a repetition of the situation in which she found herself unable to punish the assailants of Mattueof, the ambassador of Peter the Great. Ward, *History of the Law of Nations*, II, p. 498; Martens, *Causes Célèbres*, I, p. 73. As a result of the *McLeod Case*, the United States extended her Habeas Corpus Act, *Rev. Stat.*, § 753; Moore, *Digest*, II, p. 30; Gammans, in *A. J.*, VIII, p. 73. Sections 4063 and 4064 of the *Revised Statutes* may be regarded as indispensable legislation (protection of ambassadors). See also the report of the French parliamentary committee upon a *projet de loi* which would take away from juries the right of passing upon offenses against diplomatic agents: "Nous estimons, en effet, que le souci des bonnes relations que nous devons entretenir avec toutes les puissances étrangères nous commande d'assurer une prompte et énergique repression des offenses et outrages dont peuvent avoir à se plaindre les chefs d'état étrangers ou les représentants," *Journal officiel*, 1893, Doc. parl., Ch. de Dep., Annexe No. 2557, p. 61.

⁷⁸ Borchard, *Diplomatic Protection*, pp. 125-129. See notes 73-77, *supra*.

may make; nor can the state be held liable for them.⁷⁹ While this is most desirable internally, externally it raises delicate questions of state responsibility for judicial proceedings. The problem of responsibility for judicial actions is further complicated by the frequent lack of sufficient jurisdiction which would enable the court properly to protect the international obligations of the state—a legislative failure, in reality; and by the confusion with ‘denial of justice’ which arises from the failure of the court properly to protect the rights of aliens.

It is necessary to distinguish between cases of responsibility arising from the action of the court when it is applying a rule of international law, and when it is applying municipal law. The extent to which the duty of interpreting international law within a state must be assumed by the courts of that state varies in different states. The new German (Art. 4) and the new Austrian (Art. 9) constitutions make international law an integral and obligatory part of municipal law; and many famous decisions have established the same rule in the United States.⁸⁰ While some inconsistency is found in English practice, it is probably correct to say that a similar situation exists in England.⁸¹ In other states, the burden of executing international law, or of interpreting it for the courts to use, may fall upon the legislative or executive departments, which must give to the courts the authority to act in each instance by having a proper municipal rule ready for the courts to follow.⁸² Whatever be the situation of the court, its decision con-

⁷⁹ Borchard, *Diplomatic Protection*, p. 195; Decencière-Ferrandière, *Responsabilité*, pp. 111-112.

⁸⁰ “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination,” *Paquete Habana*, 175 U. S. 700. See Wright, *Enforcement*, p. 225 *et seq.*; Hyde, *International Law*, I, p. 13.

⁸¹ See Westlake’s comments upon the *West Rand Central Gold Mining Co. Case* (L. R. 2 K. B., 391), in *Law Quarterly Review*, 22, p. 19. “A public right, recognized by the Law of Nations, is a legal right, because the Law of Nations is part of the common law of England,” *Emperor of Austria v. Day and Kossuth*, 2 Giffard 628. But in *Mortensen v. Peters*, a Scotch court held that “international law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the Law of Scotland,” 14 *Scots Law Times Report* 237, Evans, *Cases*, p. 29.

⁸² Mr. Wright points out that in certain Continental states the burden upon the legislature is greater than in states whose courts enforce international law as part of the law of the land. “But though states are not obliged to incorporate international law as a whole into their municipal law, they are obliged to see that its

trary to a rule of international law, whether due to the judges themselves, or to the restrictions upon the capacity of the court set by the laws of the state, at once engages the responsibility of the state.⁸³ "The defense of *res adjudicata* does not apply to cases where the judgment set up is in violation of international law."⁸⁴ Arbitral courts consider the decisions of national courts as establishing no barrier to the formation of their own judgments;⁸⁵ nor has the United States, in its correspondence, allowed such an objection to be interposed.⁸⁶ Revision, by an international tribunal, of a decision of a municipal court contrary to international law, is quite possible and proper.⁸⁷ The court, in exercising its function

provisions are respected if not by judicial, then by legislative or executive enforcement." And, he concludes, "States whose constitutions fail to provide for a proper observance of international law find themselves unable to participate fully in the family of nations through lack of recognition or the imposition of extraordinary limitations upon independence," *A. J.*, XVII, p. 241. See Hyde, *International Law*, I, p. 466.

⁸³ Anzilotti suggests the violation of extradition treaties, the treatment of regular combatants as criminals (see *Arce v. State of Texas*, 202 S. W. 951), or the confiscation of the property of prisoners of war. A ludicrous example of judicial violation of international law is found in Moore, *Digest*, IV, p. 639. See Mr. Gallatin to Mr. Price, February 11, 1824, *ibid.*, p. 698. Many claims have arisen as the result of condemnations by prize courts contrary to international law, Moore, *Digest*, VI, § 991, VII, § 1244; Wharton, *Digest*, III, § 329a; Moore, *Arbitrations*, p. 3160 *et seq.*

"Similarly, the judgment of a court in violation of a treaty or of international law serves to render the state responsible," Borchard, *Diplomatic Protection*, p. 197; and see Hyde, *International Law*, I, pp. 467, 510; Hall, *International Law*, p. 269.

⁸⁴ Wharton, *Digest*, II, p. 671, quoted in Moore, *Digest*, VI, p. 694. "The objection that the judicial decision at Nassau relieves Great Britain of all responsibility can not be maintained. As regards the internal (or municipal) law, the judgment is valid; but as far as international law is concerned, it does not alter the position of Great Britain," Mr. Staempli, Opinion in Geneva Tribunal of 1872, Wharton, *Digest*, III, p. 194.

⁸⁵ "International arbitration, is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court, to make an award in addition thereto or in aid thereof as in the given case justice may require," *Selwyn Case*, Ralston, *Venezuelan Arbitrations*, p. 323, and see authorities cited by Umpire Plumley on pp. 326-327. Also, the *Rudloff Case*, *ibid.*, p. 185; *Betsey*, Moore, *Arbitrations*, p. 3163; *Phare*, *ibid.*, p. 4871; *Case of Wilkinson*, *ibid.*, p. 3737; concurring opinion of Nielsen in *Neer Case*, General Claims Commission, U. S. and Mexico, Docket No. 136; *Kennedy Case*, *ibid.*, Docket No. 7, with citations therein.

⁸⁶ "This Department has contested and denied the doctrine that a government may set up the judgment of one of its own courts as a bar to an international claim, when such judgment is shown to have been unjust or in violation of the principles of international law," Report of Mr. Bayard, February 26, 1887, Moore, *Digest*, VI, p. 667. See also *Van Bokkelen's Case*, Moore, *Arbitrations*, p. 1809; Moore, *Digest*, VI, p. 699; and Borchard, *Diplomatic Protection*, pp. 342-343.

⁸⁷ "No court in the world has greater power and independence and honor than the

of applying the domestic law, may be compelled to violate international law.⁸⁸ While its decision may be necessary and correct under municipal law, whenever the court, by any process, occasions an injury under international law, its state must be responsible therefor.

In applying local laws affording redress to aliens, however, no internationally illegal act is apparent until the alien is confronted with a denial of justice. The obligation of the court is now—as will later be seen—merely to give to the alien a fair and just administration of the local laws.⁸⁹ That the court has erred in its application of the local law, or in its evaluation of facts; or that the procedure seems unnecessarily harsh to the alien; or that the decision has been adverse to him, does not necessarily give to the alien a claim to diplomatic interposition, or impose responsibility upon the state.⁹⁰ In the *Croft Case*, and in the *Yuille, Shortridge*

Supreme Court, established under the Constitution of the United States, yet our government, by international agreement, has submitted to international tribunals many cases which could have been, and many cases which already had been, decided by that great court," Root, in *A. J.*, III, p. 535. In addition to a number of cases in which the Supreme Court was affirmed, he cites the following in which it was reversed: *Hiawatha* (2 Black); *Circassian* (2 Wall); *Springbok* (5 Wall); *Sir Wm. Peel* (5 Wall); *Volant* (5 Wall); *Science* (5 Wall). Ralston gives the same list and adds: "The United States faithfully abided by the decisions of the commission adverse to its own courts," *Law and Procedure*, § 179; and see generally §§ 175-181.

An excellent illustration of the principle under discussion is found in the *Case of La Ninfa*. An Act of Congress of 1889 extended American maritime jurisdiction far beyond the usual three-mile limit; and the Act was upheld in the Federal Courts, 49 Fed. 575, 143 U. S. 472. When the matter was submitted to arbitration, the decision was against the United States; and subsequently the court held that in accordance with this decision, it must now decide against the Act of Congress, 75 Fed. 513; Wright, *Control*, pp. 116, 164, 174, 224.

⁸⁸ In the United States, the courts impute to the legislature every intention of observing international law, and will interpret their acts in accordance with that law if possible. See *Case of Cheung Sum Shee v. Nagle*, 268 U. S. 342.

⁸⁹ Borchard, *Diplomatic Protection*, § 130; Hyde, *International Law*, I, § 287. "It is the province of the judiciary to construe and administer the laws, and if this be done promptly and impartially towards American citizens and with a just regard to their rights they have no cause of complaint," Mr. Buchanan to Mr. Ten Eyck, August 28, 1848, Moore, *Digest*, VI, p. 273.

The protection due to the alien will be discussed in Chapter IV, and denial of justice in Chapter V, *infra*.

⁹⁰ "I need not say to you that a judicial court can not make reparation in damages for any error into which it has fallen and that it is a principle vital to that independence of the judiciary which this Government cherishes as an invaluable safeguard for the rights and liberties of the subject, that judges should not be held personally responsible for errors of judgment," Mr. J. C. B. Davis to Mr. Chase, January 10, 1870, Moore, *Digest*, VI, p. 750. "Irregularities in the prosecution of a citizen of the United States in Chile, not amounting to a denial of justice or an undue dis-

Co. Case, the Senate of Hamburg, as arbiter, held that since the judiciary in a state occupies a peculiarly independent position, Portugal could not be held responsible for its decisions. These opinions are open to severe criticism;⁹¹ for it could never be admitted that any part of the machinery of the state is so independent as to entitle the state to complete irresponsibility for its acts. If the court directly collides with international law, or if it is guilty of denial of justice, through fraud, excess of jurisdiction, improper process, or otherwise, it has committed an internationally illegal act for which the state may be held responsible. There can be no doubt that a court, as any other agency of the state, may, through an internationally illegal act, bring responsibility upon its state: the difficulty lies in determining which of its acts are illegal.

It is sometimes said that no responsibility appears upon the state until the case has been carried to the highest court. Thus Mr. Borchard:

It is a fundamental principle that the acts of inferior judges or courts do not render the state internationally liable when the claimant has failed to exhaust his local means of redress by judicial appeal or otherwise, for only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state.⁹²

This statement may be accepted if "internationally liable" may be interpreted to mean that diplomatic interposition is not in order.

crimination against him as an alien, will not be ground for the interference of the United States," Mr. Marcy to Mr. Starkweather, August 24, 1855, *ibid.*, p. 264. See, in general, *ibid.*, §§ 912, 913, 1002; and the doctrinal discussion of the *Affaire White*, in Lapradelle-Politis, *Recueil*, II, p. 330 *et seq.*

In the well-known *Case of the Costa Rica Packet*, Martens held Holland responsible for the error of the court in taking jurisdiction over an English citizen for an act taking place outside of her territorial limits. While, as Mr. Borchard says, "few arbitral awards have been more severely criticized than the decision of the *Costa Rica Packet* case," the decision was in principle correct, for the error of the court was in itself a violation of international law. Nevertheless, the decision seems unduly harsh, in view of the facts of the case.

See, on this point, Borchard, *Diplomatic Protection*, pp. 195, 332-334, 340; Hyde, *International Law*, I, § 286; de Visscher, *Responsabilité*, p. 98; Schoen, *Haftung*, p. 83; Strupp, *Völkerrechtliche Delikt*, p. 74.

⁹¹ See Lapradelle-Politis, *Recueil*, II, pp. 1-37, 78-118. The editor criticizes as follows: "comme l'administration active, les autorités judiciaires sont des organes d'État; il importe peu que le gouvernement ait sur elles moins de prise que sur les autres rouages, car . . . on doit mesurer la responsabilité . . . sur l'attitude de l'État considéré comme une entité faisant siens les actes de toutes ses autorités, quelles qu'elles soient."

⁹² Borchard, *Diplomatic Protection*, p. 198.

Responsibility, however, may have appeared with the internationally illegal action of the lower court, though the establishment of such responsibility is not decisive of the procedure to be followed in securing redress.⁹³ Since there is usually no possibility of action against either the judge or the state for mistakes of the court, the only possibility of local relief for the injured alien lies in an appeal to a higher court. Doubtless the respondent state would insist that its superior courts be permitted to make a final pronouncement before it would feel that the diplomatic interposition of the claimant state was justifiable.

Cases involving "manifest injustice" must be differentiated from those in which the court is merely in error. The latter do not constitute internationally illegal conduct; but for the former, it would seem, the state may be held responsible.⁹⁴ When an alien appears before a court seeking relief, whether against the act of an individual or against the act of an agent of the state, the failure of the state efficiently to give him relief is a denial of justice.

⁹³ "In a word, when an inferior court, like any other authority of a State, denies justice, national responsibility is established, but the reasonableness of interposition seems to depend upon the opportunity of redress obtainable by appeal to the court of last resort," Hyde, *International Law*, I, p. 509. See Mr. Gresham to Mr. Osborn, May 17, 1893, Moore, *Digest*, VI, p. 669. M. Guerrero denies this for the Committee for Progressive Codification; but of this position M. Strisower remarked, in the discussions of the *Institut*, August 25, 1927, that it is "isolé dans la doctrine et la pratique internationale."

⁹⁴ Article 6 of the Resolutions of the *Institut* at its 1927 session (see Appendix III, *infra*) makes the state responsible if the procedure or the judgment constitutes a "manifest injustice." Inclusion of this statement in a separate Article would seem to differentiate it from denial of justice. This position is clearly taken by the General Claims Commission, U. S. and Mexico, in the recent *Chattin Case*, Docket No. 41, July 23, 1927. Support is apparently to be found for the position taken in the text, in § 29 of this opinion. Other cases of direct damage by the judiciary cited in this opinion are the *Faulkner, Roberts, Turner, and Strother Cases*, before the same Commission; and the *Rozas and Driggs Cases*, Moore, *Arbitrations*, pp. 3124, 3125; especially the *Cotesworth & Powell Case*, *ibid.*, pp. 2057, 2083. For the distinction between "manifest injustice" and "denial of justice," see §§ 34, 35, *infra*.

It must be admitted that "the line between an unjust judgment reached by proper observance of the forms of justice and a denial of justice is exceedingly vague, for responsibility is often asserted in either case," Borchard, *Diplomatic Protection*, p. 196, note 1. It is believed that, in most of the cases in which diplomatic interposition has been offered, this action was taken because in the view of the interposing state the evidence revealed either a denial of justice or a failure on the part of the local judicial system to measure up to the international standard. Reference may be made to the following cases: in Moore, *Arbitrations*, pp. 3126-3160, especially the *Cases of Garrison* (p. 3129); *Leichardt* (p. 3133); *Bronner* (p. 3134); *Jennings, Laughland and Co.* (p. 3135); *Burn* (p. 3140); *Pradel (ibid.)*; *Ada* (p. 3143); *Driggs* (p. 3160). From Ralston, *Venezuelan Arbitrations*, *Tagliaferro* (p. 3164); *De Caro* (p. 810); *Bovallins and Hedlund* (p. 952); *De Zeo* (p. 693).

Where, however, the alien is the defendant, an arbitrary, venal, or collusive judgment, a "manifest injustice," may in itself be regarded as an international illegality. In the former case, the failure of the court to give to the alien due process under the laws of that state is denial of justice; in the latter case, there is no question of local remedies until the arbitrary action of the judge compels the alien to seek relief. When he does so, his local remedies are much restricted, consisting often merely in appeal to a higher court. If this appeal does not give him relief, according to local law, there is now a denial of justice. In the former case, where the alien is the plaintiff, there is no responsibility, perhaps, until denial of justice appears; in the latter case, the state is responsible for the positive misdeed of one of its agents, but must be given the opportunity to make redress itself. In either case, then, diplomatic interposition is not permissible until denial of justice is shown.⁹⁵

§ 23. It thus appears—to summarize the discussion in this chapter—that the state may be held responsible for the acts of any of its agents, if such acts violate international law to the detriment of a foreign state or citizen thereof.⁹⁶ Since his power is put into his hands by his state, the acts performed by him in the discharge of the functions of the office must be attributed to his state. Usually, however, a state is given the opportunity to discharge its responsibility by affording local means of reparation; and where these are provided, the injured party must usually seek their aid before asking his state to represent him through diplomatic action.

It is to be emphasized that the claimant state is unconcerned with

⁹⁵ Borchard, *Diplomatic Protection*, p. 341; Decencière-Ferrandière, *Responsabilité*, pp. 113-114. See the following cases: *Turner*, Moore, *Arbitrations*, p. 3126; *Baldwin*, *ibid.*, pp. 3126-3127; *Jennings*, *Laughland & Co.*, *ibid.*, pp. 3135-3137; *Burn*, *ibid.*, p. 3140.

⁹⁶ "Claims presented by the Government of the United States against a foreign Government are based fundamentally, among other things, upon loss or injury (1) which was suffered by the United States or by its citizens or those entitled to its protection, and (2) for which a foreign Government, including its officials, branches or agencies, was responsible. If either of these elements is lacking, the validity of the claim is doubtful and, as a rule, the Government of the United States is not in a position to be of any assistance in obtaining reparation," Department of State, *Claims Circular*, Revision of January 30, 1920. "Unless the responsibility for the loss or injury for which reparation is claimed is attributable to a foreign Government, efforts of the Government of the United States on behalf of the claimant will be futile. It is essential, therefore, for claimants to show that responsibility for their losses or injuries is attributable to an official, branch, or agency of a foreign Government." See Article 1 of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

the particular agent of whose act complaint is made. The organization of the state and the apportionment of its powers among its various agents is not a matter of interest to the law of nations, further than that, in result, this organization must be capable of meeting its international obligations. This is clearly stated by Dana:

Each nation is responsible for the right working of the internal system by which it distributes its sovereign functions, and, as foreign nations dealing with it can not be permitted to interfere with or control these, so they are not to be effected or concluded by them, to their injury.⁹⁷

Externally, the state speaks with one voice, and it does not matter from which agent the voice emanates. If this principle at times works to the embarrassment or hardship of a state, the fault must be attributed to the defective organization of that state, which has not secured the proper correlation between its departments and agents, or between its subordinate governmental units.⁹⁸ The injury may result from the failure of any one or all of the three departments of government to meet the obligations of the state. Such a failure must usually be considered a fault rather than a misfortune; for it is the duty of the state to maintain her entire machinery in the condition of efficiency which the international standards require.

Questions of especial interest and difficulty arise, in this connection, with regard to the treaty-making power within a state, and with regard to the obligations placed by a treaty upon the various constituent parts of the government. Such questions are of particular importance in the United States, in which the sovereign powers have been distributed not only between the nation and the

⁹⁷ Dana's *Wheaton*, note 250, p. 543. "It is the duty of every member of the family of nations to provide itself with such a governmental organization as will enable it to meet all those duties and obligations which its position imposes upon it," Evans, *Cases*, notes, p. 51.

⁹⁸ "... states are responsible as units and that this responsibility is unaffected by domestic law," Wright, *Control*, p. 15; and see his statement in *A. J.*, XVII, p. 242. See opinion of Andrade, in *De Brissot Case*, Moore, *Arbitrations*, p. 2962 and p. 2971; *Lewis Case*, *ibid.*, p. 3019; *Baldwin Case*, *ibid.*, p. 2861; *Montijo Case*, *ibid.*, p. 1444. Also, Borchard, *Diplomatic Protection*, pp. 199, 201; de Visscher, *Responsabilité*, p. 100; Oppenheim, *International Law*, I, § 157; Triepel, *Völkerrecht und Landesrecht*, p. 358; Anzilotti, in *R. D. I. P.*, XIII, p. 301; Fenwick, *International Law*, p. 95; Hall, *International Law*, pp. 59-60, and § 97; Hyde, *International Law*, I, § 267.

states, but between the three departments of the national government. If the action of other agencies than the treaty-making power be required to give effect to the treaty, the state must accept responsibility for the failure of these agencies to do their share,⁹⁹ even though there be no constitutional method by which they may be compelled to such action. The representatives of the United States, in negotiating treaties with foreign states, have exercised great care to avoid including within the treaty any provisions which might be in conflict with her Constitution; and it has never become necessary for her courts to pass upon the validity of a treaty whose enforcement would mean a violation of her Constitution. It is believed, however, that if the treaty has been approved and ratified, by those to whom the Constitution gives authority for that purpose, the state as a whole is bound by their action.¹⁰⁰

⁹⁹ "If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws," Dana's note 250 to Wheaton's *International Law*, p. 543. This was the argument of the United States when the French legislature failed to make the necessary appropriations under the treaty concerning the spoliation claims: "Neither government has anything to do with the auxiliary legislative measures necessary, on the part of the other state, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfill it proceeds from the omission of one or the other of the departments of its government to perform its duty in respect to it," Mr. Wheaton to Mr. Butler, January 20, 1836, Wharton, *Digest*, I, p. 36. See, as to Legislative Aid, Moore, *Digest*, V, § 758; as to Appropriations, *ibid.*, § 759; as to Judicial Action, *ibid.*, § 760.

¹⁰⁰ According to Mr. Wright, "the United States would be bound by such obligation because the foreign government cannot be presumed to know of obscure constitutional limitations," *Control*, p. 78. At p. 55, he says: "The United States would be bound by a treaty even though it may subsequently appear that the treaty-making power has acted in disregard of limitations imposed by the guarantees of the Constitution. . . ." See Hall, *International Law*, pp. 351, 380-381; Fauchille, *Traité*, I, 3ème Partie, p. 352.

CHAPTER IV

ACTS OF INDIVIDUALS

§ 24. While an individual may, as has been seen in a previous chapter, violate international law and thereby occasion injury to a foreign state or its national, his act need not necessarily be attributed to the state within which he is found, or engage the responsibility of that state. The individual may himself be held to account for certain of his acts, as, for example, blockade-running. For other acts of his, the state within which they occurred may be burdened with responsibility; and many theories have been offered to explain this relationship between the act of the individual and the consequent responsibility of the state.

During the mediaeval period, the state was regarded as a collectivity, whose members were individually or collectively responsible for the act of any one member. The bond of nationality alone was sufficient to impute to the state responsibility for the act of an individual member, wherever committed; and reprisals might be directed against the whole state or against any member thereof.¹ At the same time that, subsequently, the personality of the modern state was being developed, as an entity distinct from its members, Grotius was laying down his theory of state responsibility, influenced partly by Roman and partly by natural law. According to the Grotian theory, still widely quoted, the state could become responsible for the acts of its members only through complicity.² There could be no responsibility without fault; and Grotius stated precisely what he considered to be complicity: command, advice, aid, encouragement, and especially *patientia et receptus*. Subsequent writers built upon this doctrine of Grotius a distinction between direct (for its own acts) and indirect (for acts of individuals) responsibility on the part of the state.³ As responsibility was wid-

¹ Jess, *Politische Handlungen*, § 3, p. 14; Decencière-Ferrandière, *Responsabilité*, p. 62, note 2; Lapradelle-Politis, *Recueil*, II, p. 972.

² Grotius, *De Jure Belli et Pacis*, II, XVIII, § 21; II, XXI, 1-4; II, XVII, and XX-XXIII; Jess, *Politische Handlungen*, p. 14 *et seq.*; and see pp. 17-18, *supra*, and pp. 208-210, *infra*.

³ See § 61, Chapter IX, *infra*.

ened by practice, it became necessary for the followers of Grotius to expand his theory; and the presumption was introduced that the state is *prima facie* responsible for all acts committed within its territories, on the ground that the state could be assumed to know of all events occurring within its boundaries.⁴ Later writers have objected that the state and the individual cannot both be subjects of the same legal order; and they have therefore converted the *receptus* of Grotius into an independent delict of the state.⁵ That is, the state is never responsible for the act of an individual as such: the act of the individual merely occasions the responsibility of the state by revealing the state in an illegality of its own—an omission to prevent or punish, or positive encouragement of, the act of the individual.⁶

The last conception is most nearly in harmony with the practice of states to-day. While, as will appear, in a few exceptional cases, the state may be held responsible at once for the act of an individual, it is usually necessary to show an illegality on the part of the state. The state can not be regarded as an absolute guarantor of the proper conduct of all persons within its bounds.⁷ Before its responsibility may be engaged, it is necessary to show an illegality of its own; and this involves simply the question of what duties are laid upon the state with regard to individuals within its boundaries by positive international law.

Again the criterion of control must be laid down. It is one of the foundation stones of the international system, that a state should have exclusive control within its territorial limits. Since, therefore, the alien's state may not normally enter to protect him, the state of his residence is under the obligation of safeguarding him against violations of international law committed to his injury by public authorities or by private individuals. It is not the bond of nation-

⁴ Triepel, *Völkerrecht und Landesrecht*, p. 26; Schoen, *Haftung*, p. 7; Jess, *Politische Handlungen*, pp. 18-20. "*Primâ facie* a state is of course responsible for all acts or omissions taking place within its territory by which another state or the subjects of the latter are injuriously affected," Hall, *International Law*, p. 268.

⁵ Anzilotti is the chief exponent of this theory. See his works cited elsewhere. Also, Decencière-Ferrandière, *Responsabilité*, p. 79; Jess, *Politische Handlungen*, p. 22; Triepel, *Völkerrecht und Landesrecht*, p. 328.

⁶ Anzilotti, in *R. D. I. P.*, XIII, p. 14; Decencière-Ferrandière, *Responsabilité*, p. 62; Schoen, *Haftung*, p. 37; Jess, *Politische Handlungen*, pp. 22-24; Lapradelle-Politis, *Recueil*, II, p. 973; Resolutions of the *Institut*, Article 3, Appendix III, *infra*.

⁷ Borchard, *Diplomatic Protection*, p. 213; Moore, *Digest*, § 1019; Garner, in *Proc. Am. Soc.*, 1927, p. 51, quoting *U. S. v. Arjona*, 120 U. S. 479.

ality which produces this responsibility, for the state is not responsible, on the one hand, for the acts of its own nationals abroad; and it is responsible, on the other hand, for the acts of aliens within its boundaries.⁸ So long as the state is occupied, in the exercise of its usual functions, with its own nationals, its attitude toward them is a purely domestic affair.⁹ It is in the possibility of an injury to an alien that international law becomes interested in the conduct of individuals: the territorial control exercised by one state, and the interest which another state has in protecting its nationals abroad, become mutually corrective forces, whose smooth interplay is made possible by the provisions of the law of nations. Without such protection from the outside, international intercourse would become impossible. Since international law must prevail within each state, all states in consequence thereof are burdened with the obligation of respecting the rights, within their own territories, of other states or their members.¹⁰ The responsibility of the state for the acts of individuals is therefore based upon the territorial control which it enjoys, and which enables it, and it alone, to restrain and punish individuals, whether nationals or not, within its limits. In the words of Hall:

The exclusive force possessed by the will of an independent community within the territory occupied by it is necessarily attended with corresponding responsibility. A state must not only itself obey the law, but it must take reasonable care that illegal acts are not done within its dominions . . . it becomes necessary to provide by municipal law, to a reasonable extent, against the commission by private persons of acts which are injurious to the rights of other states, and to use reasonable vigour in the administration of the law so provided.¹¹

⁸ See Goebel, in *A. J.*, VIII, pp. 803-804; Muszack, *Haftung*, p. 49; Schoen, *Haftung*, pp. 62-63; Committee for Progressive Codification, *Responsibility*, p. 9; Triepel, *Völkerrecht und Landesrecht*, p. 325; Borchard, *Diplomatic Protection*, p. 217, note 4; Wharton, *Digest*, II, § 205; Decencière-Ferrandière, *Responsabilité*, p. 118.

⁹ With a few exceptions, such as special rights conferred under treaty for the protection of minorities, river navigation, etc. See Diena, "L'individu devant l'autorité judiciaire et le droit international," *R. D. I. P.*, XVI, pp. 71-72.

¹⁰ "The essential feature of international law is not that it lays down rules of conduct for states, but that it holds states responsible for the conduct of persons," Wright, *Enforcement*, preface, p. 5. "International law is concerned not with the specific provisions of the municipal legislation of states in the matter of aliens, but with the establishment of a somewhat indefinite standard of treatment which the court can not violate without incurring international responsibility," Borchard, *Diplomatic Protection*, p. 39. See also Lapradelle-Politis, *Recueil*, II, pp. 31, 330.

¹¹ Hall, *International Law*, § 11, p. 64. "The obligations imposed upon states in

It would appear to follow, from the fact that responsibility is based upon territorial control, that the state would be responsible for all acts by individuals which do harm to a foreigner. As a matter of fact, however, the law of nations does not go so far in practice. It takes into consideration, upon the one hand, the impossibility of a state's being able to prevent all such injurious acts; and, upon the other hand, the state's own laws for the definition and punishment of injury. It is possible, therefore, that circumstances which might produce responsibility in one state would not do so in another. International law is concerned only to the extent of maintaining a general standard for the administration of justice; and the individual can not expect to take with him wherever he goes the rights which he has in his own state.

The responsibility of the state for the acts of individuals must be differentiated from that which it has for the acts of its agents. While it may be possible to conceive of the individual citizen as a representative of his state, it would be impossible to consider his acts as those of the state. The agents of the state, authorized and controlled by it, may be said to speak with the voice of the state; but the act of the individual, except in those rare cases in which the state adopts such acts as its own, can not be attributed to the state.¹² It is not to be expected that the state could exercise so vigilant a control over the acts of individuals as over those of its own agents; and it is therefore reasonable to diminish its responsibility for the former. While international law declares many acts of agents illegal, it does not so often declare the act of an individual to be internationally illegal. It has neither the machinery nor the jurisdiction by which it is able ordinarily to reach down to the individual, and must usually rely, for its enforcement, upon the state within which the individual is found. For this purpose, international law lays upon states certain definite obligations with respect

time of peace are in general derived from one fundamental conception, which may be summarized as the principle of territorial independence or territorial sovereignty," Wright, *Enforcement*, p. 21; and see also p. 45.

¹² "The act of the subject can never be the act of the sovereign; unless the subject has been commissioned by the sovereign to do it," *The Resolution*, 2 Dallas 1. "The Government of the United States is not liable to foreign governments for misconduct of its private citizens within their jurisdiction, such citizens not being in any sense its representatives," Mr. Forsyth to Mr. Calderon de la Barca, September 17, 1839, Moore, *Digest*, VI, p. 787. See Borchard, *Diplomatic Protection*, p. 217, and note 3; and in *A. J.*, XX, pp. 743-744.

to the conduct of individuals within its control; and its failure to meet these obligations may render it responsible. The enquiry as to the responsibility of states for acts of individuals therefore necessitates ascertaining the duties which are required of states with regard to individuals.

§ 25. The individual may do harm either to a foreign state itself or to an alien. In the former case, a public claim is constituted; that is, a claim by a foreign state in its own behalf. An important group of such acts is that which includes attacks or insults directed against the state in the person of its head, its ambassadors or other public representatives, its flag or other emblem.¹³ The especial protection to diplomatic agents is well-known; and in the Corfu episode, Italy took the murder of General Tellini, an Italian commissioned by the Conference of Ambassadors to aid in the delimitation of the Greco-Albanian frontier, as an insult to herself, and collected heavy damages from Greece.¹⁴ States have often interposed for the reparation of injuries done to their consular representatives abroad.¹⁵

A state owes at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction. Raids by Indians and other marauders from and into the United States have caused frequent discussions with Canada and Mexico.¹⁶ Reclama-

¹³ "The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world. . . ." *Respublica v. Longchamps*, Moore, *Digest*, IV, p. 622; and see *ibid.*, §§ 657-659. A number of such cases are given in Eagleton, "The Responsibility of the State for the Protection of Foreign Officials," *A. J.*, XIX, p. 293. See also Borchard, *Diplomatic Protection*, p. 216, and note 2; Hall, *International Law*, p. 357; Oppenheim, *International Law*, I, p. 259. As to insults to the flag, Moore, *Digest*, II, § 190; Stowell-Munro, *Cases*, I, p. 163.

¹⁴ This case will be discussed in more detail, *infra*, pp. 187-188.

¹⁵ For the murder of the American vice-consul Imbrie in Persia in July, 1924, the United States demanded the execution of the murderers, a large indemnity, and the expenses of a warship to carry his body home, *A. J.*, XVIII, pp. 768-774. When the French consulate at Breslau was pillaged shortly after the war, Germany apologized, restored the consulate, and paid an indemnity of 100,000 marks, *R. D. I. P.*, XXVII, p. 361. The United States paid an indemnity for the attack upon the Spanish consulate at New Orleans in 1851, Moore, *Digest*, VI, p. 812. For other examples, Moore, *Digest*, V, §§ 704, 705; Borchard, *Diplomatic Protection*, pp. 216, 223; *Mallén Case*, General Claims Commission, U. S. and Mexico, Docket No. 2935, April 27, 1927, § 6.

¹⁶ Moore, *Digest*, II, §§ 222, 223; Moore, *Arbitrations*, p. 4027 *et seq.* The raid by Villa and his men in March, 1916, into American territory resulted in a punitive expedition into Mexico, and an acrimonious correspondence with Carranza, *A. J.*, XI, pp. 399-406.

tions may originate in the preparation of hostile enterprises within one state against another;¹⁷ and the *Alabama Case* is a famous illustration of the reparation which may be required from a state for failing to observe its international obligations.¹⁸ The United States has contended that a national or agent of one state may not take from another state, without the consent of the latter, a person within its jurisdiction.¹⁹

There is some evidence to indicate that attacks upon aliens by individuals may be taken up, under certain circumstances, as an injury to the alien's state and treated as a public claim. It has been maintained that the injury which the state receives through the weakening of its political or economic strength in an injury done to an individual justifies the state in considering such injury as the basis for a public claim.²⁰ Where the injury to the alien takes on the character of a discrimination against his nationality, interposition is more apt to follow. Responsibility has been claimed for a boycott directed against citizens of a particular state; but it is to be doubted whether a rule of international law exists to cover such a case.²¹ More support is to be found in cases of xenophobia, where a mob action is directed against one national group.²²

¹⁷ "Section 5286, Revised Statutes, creates two offenses, (1) the setting on foot, within the United States, a military expedition, to be carried on against any power, etc., with whom the United States are at peace; (2) providing the means for such an expedition," *U. S. v. Hart*, stated by Moore, *Digest*, VII, p. 915. For other examples, *ibid.*, §§ 1299, 1300; *Kennett v. Chambers*, 14 Howard 49; *Jarvis Case*, Ralston, *Venezuelan Arbitrations*, p. 149; Austrian ultimatum to Serbia, 1914.

¹⁸ Many other examples may be found in Moore, *Digest*, VII, §§ 1293, 1294, 1290, 1295. "From the supremacy and exclusiveness of the territorial jurisdiction, it follows that it is the duty of the state, within the bounds of legal responsibility, to prevent its territory and territorial waters from being used to the injury of another state," Moore (himself speaking), *Digest*, II, p. 446.

¹⁹ *Case of Madeline His*, *ibid.*, II, pp. 384-389.

²⁰ "It is competent for a nation to exact reparation from another nation for the economic loss that the former may have sustained through the wrongful taking of the lives of its nationals by the latter," German American Mixed Claims Commission, *Decisions and Opinions*, Administrative Decision No. V, p. 208. See also Borchard, *Diplomatic Protection*, p. 351; *Miliani Case*, Ralston, *Venezuelan Arbitrations*, p. 754; *Stevenson Case*, *ibid.*, p. 438.

²¹ Mr. Sherman to Mr. Hoshi, March 31, 1897, Moore, *Digest*, VI, p. 791; Fauchille, *Traité*, I, p. 528; I, 3ème Partie, p. 701; Clunet, "Actes et offenses hostiles commis par des particuliers contre un État étranger," in Clunet, XIV, p. 5. Decencière-Ferrandière, *Responsabilité*, points out that there can be no responsibility because there is no share by the government, p. 132 and note.

²² Goebel, in *A. J.*, VIII, p. 812; Muszack, *Haftung*, p. 51; Bar, *loc. cit.*, p. 471; Borchard, *Diplomatic Protection*, p. 216. Such a rule is denied by Decencière-Ferrandière, *Responsabilité*, pp. 129-130.

An effort has apparently been made to treat such cases as these in the same manner as those in which the injury to the foreign state was the result of the act of an agent of the state, i.e., to exclude local remedies and to claim at once through diplomatic channels. Many cases may be found of injuries suffered by foreign states through individual action, in which such a course of action was pursued. It is, however, to be doubted whether the requirement that local remedies should be utilized is eliminated in these cases. For counterfeiting, damage to state property, and other matters, local remedies have been asserted as a primary recourse; and even in attacks upon diplomatic agents, or libel against a sovereign, redress has been sought in domestic courts.²³ In many cases in which the state has sought reparation through direct diplomatic action, its procedure may have been due to the lack of proper vigilance, or the absence or failure of local remedies; but, in some cases, it can only be explained upon the assumption that the act of the individual was taken as an affront to the dignity and self-respect of the state. Such a differentiation would be difficult to prove by practice; nor would it be a desirable criterion for action, since national honor is a capacious critic, and justice may easily be forgotten in times of passion.²⁴ An offending state should always be given the opportunity to punish individuals whose injurious actions it has not been able to foresee or prevent. The tendency toward accepting the results of local administration of justice, provided it measures up to the international standard, is one worthy of encouragement, whether a state be the injured party or not.

§ 26. The act of the individual which most often engenders a responsibility on the part of his state is, of course, that which does

²³ "Foreign States at peace with this country have always been held entitled to the assistance of the law of England to vindicate and protect their rights, and to punish offenders against those acknowledged public privileges recognised by the law of nations. . . . The prosecution and conviction of M. Peltier, for a libel on the First Consul of France, proceeded on this principle. In earlier times Lord George Gordon was tried and convicted for a libel on the Queen of France," *Emperor of Austria v. Day and Kossuth*, 2 Giffard 628, Evans, *Cases*, p. 29. It will be remembered that though Peltier paid only a nominal fine, Napoleon was forced to accept the verdict of the English court.

²⁴ Exaggerated instances of reparation for injured self-respect are found in the case of a German mob which tore down the French flag on the embassy building in Berlin, *R. D. I. P.*, XXVII, p. 358; and for the murder of Sergeant Mannheim, Fauchille, *Traité*, I, p. 528; as well as the demands made by Italy upon Greece in 1923. See note 15, *supra*.

injury to an alien; and it is for this situation that the rules and procedure of responsibility in international law have been most carefully worked out. The duty which the state owes to aliens whom it has admitted is most frequently, if not usually, stated to be, that the state must assure to the alien the same amount of protection which it gives to its own citizens, no more, no less.²⁵ While this is unquestionably correct as a general statement of the rule, it must always be subject to the proviso that the justice administered within a state is satisfactory to the community of nations. A state may be responsible, not merely for the same protection which it offers to its own citizens, but for a protection which measures up

²⁵ "It is an established principle of international law that a nation is responsible for wrongs done by its citizens to citizens of a friendly power. Ordinarily this responsibility is discharged by a government rendering to a resident alien the same protection which it owes to its own citizens and bringing the perpetrators to trial and punishment," *Jonathan Brown v. U. S. and the Brulé Sioux*, 32 Ct. Cl. 433, Scott, *Cases*, p. 116, note 43; and see also Mr. Scott's statement on p. 123, *ibid.*: "The foreign sojourner is entitled to an equal, not greater, protection than the native resident." "An alien domiciled in a foreign country is not, said the Department, entitled to any greater privileges or immunities than a native. If war breaks out there, he, in common with the other inhabitants of the country, is necessarily exposed to the inconveniences and disadvantages of such a state of things, and, if his property is injured or destroyed, the Government can not legally be held accountable therefor," Mr. Olney to Mr. Thompson, January 29, 1896, Moore, *Digest*, VI, p. 892. See also Mr. Webster to Mr. Calderon de la Barca, November 13, 1851, *ibid.*, pp. 812-813; Mr. Evarts to Chen Lan Pin, December 30, 1880, *ibid.*, p. 820; Opinion of Mr. Wadsworth, *Case of Salvador Prats*, Moore, *Arbitrations*, p. 2888, and Opinion of Palaccio, *ibid.*, p. 2893; *McManus Case*, *ibid.*, p. 3412.

"Un État se declare responsable envers les étrangers, dans le cas et dans les mêmes conditions ou il se declare tenu dans ses rapports avec ses citoyens," Tchernoff, *Protection*, p. 277. Ralston quotes, as "the most extensive discussion given the general subject," the *Case of Rosa Gelbtrunk v. Salvador*, *For. Rel.*, 1902, p. 877. He himself says that while there are qualifications to the rule they do not affect its general soundness, Ralston, *Law and Procedure*, pp. 270-271. See Fiore, *International Law Codified*, Sec. 674; Schoen, *Haftung*, pp. 74-75; Triepel, *Völkerrecht und Landesrecht*, p. 343; Pradier-Fodéré, *Traité*, I, § 204; Hyde, *International Law*, I, p. 468; Fauchille, *Traité*, I, p. 518; Oppenheim, *International Law*, I, §§ 320, 321; Strupp, *Völkerrechtliche Delikt* p. 118. The report of M. Guerrero to the Committee for the Progressive Codification of International Law denies that a state is obliged to accord even equality with its own citizens unless by treaty, and asserts that the maximum that can be claimed is civil equality. Mr. Borchard remarks, with regard to this impossible position, that it is contrary to theory, law, and practice, *A. J.*, XX, p. 741.

It has been argued that the alien must accept the fate of the citizens with whom he associates. Mr. Seward to Mr. Burton, April 27, 1866, Moore, *Digest*, VI, p. 660; Mr. Davis to Mr. Ulrich, March 21, 1870, *ibid.*, II, pp. 62-63; Webster's Report to the President, December 23, 1851, Wharton, *Digest*, II, p. 613; *Dix Case*, Ralston, *Venezuelan Arbitrations*, p. 10. While Mr. Borchard's statement that the United States has never taken this position is not strictly accurate, such cases are nevertheless exceptional. Borchard, *Diplomatic Protection*, p. 106.

to reasonable standards of civilized justice. It may set such standards as it may desire for its own citizens; but where an alien is concerned, international law enters with its own standards. In the recently decided *Neer Case*, the Commission held

(first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of an intelligent law, or from the fact that the laws of the country do not empower the authorities to measure up to international standards, is immaterial.²⁶

However difficult it may be to define precisely this international standard of justice, there can be no doubt that it sets a limitation upon the respondent state, and prohibits it from setting itself up as the final judge concerning the treatment which aliens within its territories receive from its hands.²⁷ While discrimination against aliens, in the matter of justice, is prohibited by international law,²⁸

²⁶ General Claims Commission, U. S. and Mexico, Docket No. 136, October 15, 1926. A similar position was taken by the Commission in the *Faulkner Case*, Docket No. 47, Sec. 10; the *Garcia and Garza Case*, *ibid.*, Docket No. 292; and in the *Roberts Case*, *ibid.*, Docket No. 185, November 2, 1926. Before an earlier Commission, the American Commissioners made the following statement: "if Mexico wished to maintain rank and fellowship among the civilized nations of the earth, she must place her laws on a footing with the laws of other nations, so far as related to intercourse with foreigners. What oppression they might practice upon their citizens was one thing; the practice of similar oppressions upon foreigners was another thing. The latter had the right to appeal to the protection of their government, if injured," *Baldwin Case*, Moore, *Arbitrations*, p. 3238.

²⁷ "While, however, a government may construe according to its pleasure its obligations to protect its own citizens from injury, foreign governments have a right, and it is their duty, to judge whether their citizens have received the protection due to them pursuant to public law and treaties," Mr. Fish to Mr. Foster, December 16, 1873, Moore, *Digest*, VI, p. 265. Similarly, Mr. Forsyth to Mr. Semple, February 12, 1839, *ibid.*, VI, p. 249; Mr. Blaine to Mr. Dougherty, January 5, 1891, *ibid.*, VI, p. 805; Mr. Blaine to Mr. Caamano, March 13, 1890, *ibid.*, VI, p. 258; Mr. Bayard to Mr. Copeland, February 23, 1886, *ibid.*, VI, p. 699; Mr. Blaine to Mr. O'Connor, November 25, 1881, *ibid.*, IV, p. 13; Mr. Bayard to Mr. Smithers, June 1, 1885, *ibid.*, VII, p. 878; Mr. Bayard to Mr. Morrow, *ibid.*, VI, p. 280.

²⁸ "Discrimination against an American citizen on the ground of alienage, by which he is excluded from redress in courts of justice for injuries inflicted on him, is a ground for diplomatic interposition," Mr. Porter to Mr. Phelps, June 4, 1885, Moore, *Digest*, VI, p. 253, and see *ibid.*, § 992, headed "Unjust Discriminations." "But the alien may no doubt be the object of some discriminations without necessarily im-

it is, on the other hand, quite possible that international law may require discrimination in favor of aliens. It is, says the Mexican-American Claims Commission, a matter of a difference in rights:

it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under municipal laws. The reports of decisions made by arbitral tribunals long prior to the Treaty of 1923 contain many such instances. There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law, aliens may enjoy rights and remedies which the nation does not accord to its own citizens.²⁹

If the internal constitution of a state sets limitations upon the competence of its agents, thereby depriving them of the ability to extend to aliens the required protection, its system does not attain to the standards set by international law; and the alien's state may interpose and demand a special protection for him, over and above that permitted by the ordinary machinery of the state.³⁰

There is, says Mr. Root,

a standard of justice, very simple, very fundamental, and of such general

puting to the country of his residence a violation of international law," Hyde, *International Law*, I, p. 469. Mr. Hyde, in the appended foot-note, offers the *judicatum solvi*, demanded in some states, as an example.

²⁹ General Claims Commission, U. S. and Mexico, Docket No. 39, March 31, 1926, *Case of George W. Hopkins*, p. 9. See opinion of same Commission in the *North American Dredging Co. Case*, Docket No. 1223, p. 8; Mr. Blaine to Mr. Dougherty, January 5, 1891, Moore, *Digest*, VI, pp. 803-804; Lapradelle-Politis, doctrinal notes in *Eliza and Ruden Cases*, *Recueil*, II, pp. 278-279, 593; Hyde, *International Law*, I, pp. 469-470; Strupp, *Völkerrechtliche Delikt*, p. 75; Resolutions of *Institut*, 1927, Art. 4, Appendix III, *infra*.

³⁰ Mr. Borchard, in discussing the rule that aliens shall receive only equality of treatment, says: "However unqualified this doctrine may be, as a matter of principle, the practice of the stronger nations in their relations with the exploited countries of the world has demonstrated that this action is conditioned upon the premise that the local civil and criminal law and its administration do not fall below the standard of civilized justice established by international law," *Diplomatic Protection*, p. 179. The standard is, however, enforced against the larger states when necessary, as the indemnities paid by the United States for mob riots witness. See also Hyde, *International Law*, I, p. 465, and §§ 266 and 267 generally; Hall, *International Law*, pp. 59-60; Fauchille, *Traité*, I, p. 533; Lansing, in *Proc. Am. Soc.*, II, p. 60; doctrinal note to *White Case*, Lapradelle-Politis, *Recueil*, II, p. 330; Anzilotti, in *R. D. I. P.*, XIII, p. 19.

acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard.⁸¹

As a matter of fact, the standard is not susceptible of complete and definitive statement; and the widely divergent systems of jurisprudence and methods of administering justice make it the more difficult to establish any clearcut measure. But while it is unfortunately true that such indefiniteness opens the way to abuse of weaker states, the remedy is not limitation of the right of interposition, but a more precise statement of what is expected of the state, and a more impartial interpretation and enforcement of the requirements, by the community of nations.

The first duty of the state is to provide domestic laws in harmony with international law, and machinery which will enable it to ensure the requisite protection for the alien. In the choice of means for this purpose a wide discretion is left to the state; but obviously, under modern governments, laws and courts are primary essentials.⁸² It is in the provision and operation of this system that the test of the state is found. If the jurisdiction of the courts is not sufficient to enable them to give to the alien the protection which international law demands, or if they are notoriously incompetent or corrupt; if the officials of the state are arbitrary or actuated by selfish motives; if prisons are unfit for habitation; or if, in many other ways, the administration of justice is habitually and notoriously below that maintained in civilized states, the state whose national is injured therein may be justified in disregarding insufficient local remedies, and seeking reparation through diplomatic channels. While internal disorder and instability may at times explain the inability of a state to give proper protection, such faults

⁸¹ In *Proc. Am. Soc.*, IV, p. 21. See Article I, last paragraph, of the Treaty between the United States and Germany of December 8, 1923, *Treaty Series No. 725*: "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law."

⁸² Hyde, *International Law*, I, p. 466; Hall, *International Law*, § 11; Borchard, *Diplomatic Protection*, p. 213; Mr. Blaine to Mr. Dougherty, January 5, 1891, Moore, *Digest*, VI, p. 805; and see *ibid.*, § 988.

as these are ordinarily the result of legislative failure, or of a vice in constitutional organization.

§ 27. If a state has provided itself with a system whose general administration is ordinarily satisfactory to the community of nations, it still remains true that occasional lapses or failures of the system may bring responsibility upon the state. It is sometimes loosely said that the duty of the state is to see to it that reparation is made for damages suffered by aliens. This statement, while true, does not yield the entire truth, and is therefore misleading. The state has two duties: a duty of prevention, and a duty of redress. It may incur responsibility for insufficient effort to prevent an injury as well as for failure in its subsequent duty of providing redress.³³ Claims have often been based upon the negligence of the state in restraining injurious acts. In the *Smyth Case*, the United States took the position that

It is the duty of Brazil when she receives the citizens of a friendly state to protect the property which they carry with them or may acquire there.³⁴

³³ Ralston quotes the decision of Umpire Thorton in the *Pradel Case* (Moore, *Arbitrations*, p. 3423) to the effect that no injury had been done until the claimant had presented his claim to the Mexican Government and been denied redress, and comments thereon that there have been no other cases to support this view. Ralston, *Law and Procedure*, pp. 239-240. See the opinion of Umpire Palaccio in the *Salvador Prats Case*, Moore, *Arbitrations*, p. 2893; *Evertsz Case*, Ralston, *Venezuelan Arbitrations*, p. 904; *Caccavelli Case*, *For. Rel.*, 1895, I, p. 398.

"The government of a foreign state is liable not only for any injury done by it, or with its permission, to citizens of the United States or their property, but for any such injury which by the exercise of reasonable care it could have averted," Report of Dr. Francis Wharton, Moore, *Digest*, VI, p. 791.

"Hence it becomes necessary to provide by municipal law, to a reasonable extent, against the commission by private persons of acts which are injurious to the rights of other states, and to use reasonable vigour in the administration of the law so provided," Hall, *International Law*, pp. 64-65. "The failure of a government to use due diligence to prevent a private injury is a well-recognized ground of international responsibility," Borchard, *Diplomatic Protection*, p. 217. See also Oppenheim, *International Law*, I, § 164; Benjamin, *Haftung*, p. 26; Muszack, *Haftung*, pp. 40, 55; Hyde, *International Law*, I, § 289; Lansing, in *Proc. Am. Soc.*, II, p. 47; Decenière-Ferrandière, *Responsabilité*, p. 120, referring to Lapradelle-Politis, *Recueil*, II, p. 522; Project No. 15 of the American Institute of International Law, *A. J.*, XX, Supplement, p. 328; Rougier, *Les guerres civiles et le droit des gens* (Paris, 1903), p. 466; Garner, in *Proc. Am. Soc.*, 1927, p. 57.

³⁴ Mr. Fish to Mr. Partridge, March 5, 1875, Moore, *Digest*, VI, p. 816.

"But the Government of Mexico in its sovereign capacity owed the duty to protect the persons and property within its jurisdiction by such means as were reasonably necessary to accomplish that end. A failure to discharge that duty resulting in loss or damage to an American national, if espoused and presented by the Government

Damages have frequently been assessed in cases where the state has not been efficient in the exercise of its duties of prevention and restraint;³⁵ and they have been denied where the state was properly diligent.³⁶

The duty of prevention is not, of course, an absolute one. Whether the state has fulfilled its obligations in this regard is measured by the rule of due diligence; and it is impossible to state this rule with precision. No clear and definite formula has ever been promulgated: it is necessary to study other cases, and to judge according to the circumstances in any particular situation. The following attempt by Palaccio illustrates the difficulty:

What is the degree of diligence required for the due performance of duty? And the answer will be very obvious—that diligence must be such as to render impossible any other, better or more careful and attentive, so as not to omit anything, practical or possible which ought to have been done in the case. . . . The same truth will be expressed in a more practical language by saying that the extent of the duties is to be commensurate with the extent of the means for performing the same, and that he

of the United States of America, would fall within the jurisdiction of this Commission," Opinion in the *Home Insurance Co. Case*, U. S. and Mexico, General Claims Commission, March 31, 1926, Sec. 17. And see Mr. Bayard to Mr. Bragg, March 15, 1888, Moore, *Digest*, VI, p. 801; Mr. Cadwalader to Mr. Foster, September 22, 1874, *ibid.*, VI, p. 678; *U. S. v. Arjona*, 120, U. S. 479.

³⁵ See *Cases of Knapp and Reynolds, Baldwin, Labaree, and Perdicaris*, in Moore, *Digest*, VI, § 1021; and more generally §§ 1022-1032. Also, *Piedras Negras Claims*, Moore, *Arbitrations*, p. 3036; *Montijo Case*, *ibid.*, p. 1444; *Youmans Case*, General Claims Commission, U. S. and Mexico, Docket No. 271, November 23, 1926.

The Commission appointed by the Conference of Ambassadors to investigate the responsibility of Greece for the murder of General Tellini in 1923 noted several instances of negligence on the part of Greece but were "unable to express an opinion as to whether the Greek Government should be held responsible for this negligence or whether the negligence is the result of the defective organization of a police administration which has only rudimentary machinery at its disposal for criminal investigations." The Conference of Ambassadors, however, held Greece liable. Concerning this, and other cases, see Eagleton, in *A. J.*, XIX, pp. 305 *et seq.* The Austrian ultimatum to Serbia in 1914 also bears upon this point.

³⁶ "The question then arises in this case, Did the Government of Mexico fail in the discharge of its duty as sovereign to take all reasonable measures to protect the coffee in question? The Commission decides that the record as presented discloses no such failure," Opinion in the *Home Insurance Co. Case*, continuing the citation in note 34, *supra*. See *Wipperman's Case*, Moore, *Arbitrations*, p. 3041; *Dickens Case*, *ibid.*, p. 3038; *De Brissot Case*, *ibid.*, p. 2969; *St. Albans Raid*, *ibid.*, p. 4054; *Robinson Case*, *ibid.*, p. 3038, quoted by Ralston, *Law and Procedure*, p. 273; *Mills Case*, *ibid.*, p. 3034; *Iloilo Case*, Nielsen's *Report*, p. 404; Mr. Hay to Mr. Dudley, September 5, 1899, Moore, *Digest*, VI, p. 806; Mr. Bayard to Mr. Rodriguez, March 15, 1887, *ibid.*, p. 791; *Jennie L. Underhill Case*, Ralston, *Venezuelan Arbitrations*, p. 50.

who has employed all the means within his reach has perfectly fulfilled his duty, irrespective of the material result of his efforts.³⁷

The meaning of the rule was thoroughly discussed in the long controversy over the *Alabama Claims*.³⁸ To the British argument that the degree of diligence necessary was merely that which "a nation is in the habit of employing in the conduct of its own affairs," the United States objected because it furnished a fluctuating standard, and because domestic affairs are not to be regarded as of the same urgency and magnitude as foreign obligations. "No diligence short of this would be 'due'; that is, commensurate with the emergency, or with the magnitude of the results of negligence."³⁹ The American position, toward which the tribunal leaned, has been severely criticized;⁴⁰ and the problem was discussed by the *Institut de Droit International*, at its 1875 meeting, with equally unsatisfactory results.⁴¹ The present interpretation of the rule is stated in the Thirteenth Convention of the Second Hague Conference of 1907, Article 25, and is summed up in the phrase that a state must use "the means at its disposal."⁴²

However, the regular or even the utmost activity of the state

³⁷ In the *Case of Salvador Prats*, Moore, *Arbitrations*, pp. 2893-2894. See also the attempt by Commissioner Wadsworth in the *Mills Case*, *ibid.*, p. 3034.

³⁸ While the *Alabama Case* is one of the duty of a government toward a government, the three rules of the Treaty of Washington, and the discussion before the tribunal, as well as the award, may be regarded as having established the rule of due diligence. *Argument of the United States on the Alabama Claims* (Paris, 1873), p. 27; Malloy, *Treaties*, III, p. 703; Phillimore, *Commentaries*, II, ix; Lapradelle-Politis, *Recueil*, pp. 852 *et seq.*, 966 *et seq.*

³⁹ *Argument of the United States on the Alabama Claims*, p. 337; *Case of the United States in the Alabama Claims* (Washington, 1867), p. 67; *British Case*, as quoted in Moore, *Arbitrations*, p. 600; Lapradelle-Politis, *Recueil*, II, doctrinal note on *Alabama Case*, p. 968 *et seq.*

⁴⁰ See the polemic in Hall, *International Law*, p. 271; and the discussion of the various theories in Lapradelle-Politis, *Recueil*, II, p. 968 *et seq.*

⁴¹ See the *Règlement* of 1875, Art. 5, which called for proof of hostile intention or manifest negligence. The term "négligence manifeste" is as uncertain in its meaning as "due diligence" itself. See, however, the position taken at the 1927 session, Appendix III, *infra*.

⁴² Lapradelle-Politis points out that this term has long been in use, particularly by the United States, and cites various treaties in which the term has been employed, *Recueil*, II, pp. 971-972. "If, in this respect, she does all in her power, and all that can be accomplished by means of her resources, it can be said that she fulfills the whole of her duties, both toward her own citizens and the citizens of foreign countries," Umpire Palaccio, in the *Case of Salvador Prats*, Moore, *Arbitrations*, pp. 2896-2897. See also Borchard, *Diplomatic Protection*, p. 214; Strupp, *Völkerrechtliche Delikt*, p. 57; Hyde, *International Law*, I, pp. 514-515; Schoen, *Haftung*, p. 60; de Visscher, *Responsabilité*, p. 103.

may here, as elsewhere, be regarded as insufficient because of the failure of the state to measure up to the international standard. It has been seen that better treatment may be required for an alien than for a national; and if the protection which the national receives is regarded as insufficient by the community of nations, the state may not argue that the alien must be content with similar treatment.⁴³ It is not always true that when a state has exercised all its resources unsuccessfully, it has discharged its obligations. It is presumed to have the power, ordinarily, to meet these obligations; and awards have been made against states on the ground that they had failed in their duties, even when they were incapable of performing them.⁴⁴ Such cases should be regarded as exceptional, and as applying only to those states which, in general, fail to measure up to the international standard.

The effort actually necessary on the part of the state depends upon circumstances. If they were beyond the ability of a normally well-organized government to control, or if they were such as could not have been foreseen and guarded against, no claim to responsibility should exist. Such was the situation in the *Wipperfman Case*:

It is notorious throughout the world that outrages of this kind on the

⁴³ "The sound general principle, peculiarly applicable to the case of the *Alabama* . . . that a government can not be allowed to say, when called upon to perform its international duties: 'The laws do not permit me to do so.' It is a self-evident proposition that if a government may by legislation fix the measure of what it owes to other states, there is no such thing as international law or international obligations," Moore (himself speaking), *Arbitrations*, p. 677. "But, where a government asserts that its citizens in a foreign country have not been duly protected, it is not competent for the government of that country to answer that it has not protected its own citizens, and thus to make the failure to perform one duty the excuse for the neglect of another," Mr. Blaine to Mr. Dougherty, January 5, 1891, Moore, *Digest*, VI, p. 805.

⁴⁴ "It is true that he had not the means for doing so, there being at hand no naval or military force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation. The first duty of every government is to make itself respected both at home and abroad. If it promises protection to those whom it promises to admit to its territory, it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz., compensate the sufferers," *Montijo Case*, Moore, *Arbitrations*, p. 1444. "Her inability to keep down rebellion in her territory, while it might be her misfortune, could not excuse the non-fulfilment of her contract," Argument of the American Commissioners in the *Baldwin Case*, *ibid.*, p. 2862. "Even assuming that the Mexican Government was unable to put down the junta by force, it was still responsible," *ibid.*, p. 2865. See the *Davy Case*, Ralston, *Venezuelan Arbitrations*, p. 411; Phillimore, *Commentaries*, I, xxi; Hyde, *International Law*, I, p. 540, citing *For. Rel.*, 1912, pp. 984, 982.

western frontier of the United States are more or less frequent, and that the whole military force of that country out of garrison has not been sufficient to prevent the occasional robbery or murder of innocent persons, whether aliens or citizens. Unless a government can be held to be an insurer of the lives and property of persons domiciled within its jurisdiction, there is no principle of sound law which can fasten upon it the responsibility for indemnity in cases of sudden and unexpected deeds of violence which reasonable foresight and the use of ordinary precautions can not prevent.⁴⁵

On the other hand, if warning had been given in time to take due precautions,⁴⁶ or if the danger was notorious and recurrent,⁴⁷ or if any special conditions existed calling for special notice,⁴⁸ it is obvious that the requisite diligence must be measured accordingly. Thus, the threat of mob action is frequently forewarned;⁴⁹ or again, a special duty of protection is necessary for a foreigner of

⁴⁵ Moore, *Arbitrations*, p. 3041. "The violence came without warning to him, or to the authorities of his asylum, and prevented all interference, as we are bound to conclude, by the suddenness of its departure, or overrode all ordinary means of resistance by the force employed and the presence of a larger military force, near enough to aid in the lawless enterprise, and lawless enough to render its aid, if circumstances should require it," *Mill's Case*, Moore, *Arbitrations*, p. 3034. See also the *Pedro Taums Case*, *ibid.*, pp. 3036-3037; *Dickens Case*, *ibid.*, p. 3038; *St. Albans Raid*, *ibid.*, p. 4054; *de Brissot Case*, *ibid.*, p. 2969; *Home Missionary Society Claim*, A. J., XV, p. 296.

⁴⁶ "The amplest notice was given both to the Federal and State authorities of the lawless proceedings of those who committed that crime. . . . The most urgent importunities were again and again addressed to the authorities by those who were in danger, but no serious steps were taken to afford them protection," Mr. Blaine to Mr. Dougherty, January 5, 1891, Moore, *Digest*, VI, p. 803. "It is desirable . . . to emphasize in advance the duty and responsibility of the Turkish Government to use its police authority to prevent such acts. By so doing sound basis is laid for claiming due redress if proper protection be not afforded," Mr. Bacon to Mr. Leishman, July 2, 1907, *For. Rel.*, 1907, II, p. 1072. See the *Revesno Case*, Ralston, *Venezuelan Arbitrations*, p. 753; Hyde, *International Law*, I, pp. 471 and 518, note 1; Borchard, *Diplomatic Protection*, p. 215.

⁴⁷ "If the acts done are undisguisedly open or of common notoriety, the state, when they are of sufficient importance, is obviously responsible for not using proper means to repress them," Hall, *International Law*, p. 269. See the *Wipperman Case*, Moore, *Arbitrations*, p. 3042; *de Brissot Case*, *ibid.*, p. 2968; *Poggioli Case*, Ralston, *Venezuelan Arbitrations*, p. 869; *Baldwin Case*, Moore, *Digest*, VI, p. 802; Hyde, *International Law*, I, p. 514; Borchard, *Diplomatic Protection*, p. 219.

⁴⁸ As, for example, the status of neutrality. See Measures Taken by China, Moore, *Digest*, IV, p. 4. "When, from whatever cause, political society is deeply stirred, it may be necessary for the state to adopt extraordinary, though entirely rational, measures for the reestablishment of order and safety," *Sambiaggio Case*, Ralston, *Venezuelan Arbitrations*, p. 673. And see note 50, *infra*.

⁴⁹ In the New Orleans Riot of 1851, placards had been posted threatening an attack upon a Spanish newspaper, Moore, *Digest*, VI, p. 811. In the riot of 1891, at New Orleans, warning was vainly given by Italian representatives, Baron Fava to Mr. Blaine, March 15, 1891, Moore, *Digest*, VI, pp. 666, 668.

public character.⁵⁰ The participation of authorities of the state is conclusive proof of the failure of the state to use the means at its disposal for preventing the injury.⁵¹

If a state is consistently negligent in its duties of prevention and restraint, it must itself accept responsibility for injuries occasioned by its omissions; and it will be given no opportunity to redress the injury in its own courts. Such cases are, however, comparatively rare; and they should be. They have appeared in dealings with countries such as Persia or Turkey, or out of the disturbed conditions in South American states. In normally well-ordered states, it will ordinarily be assumed that the government has employed all the means at its disposal for the prevention of injury; and only infrequently, as, for example, in the deplorable cases of lynch law in the United States, can such a state be accused of a lack of due diligence in its duties of prevention.

§ 28. The next duty of the state is to pursue the individual through whose act an alien has suffered injury, and to give to the alien the reparation which is provided by municipal law. It is the most important of the obligations upon the state with regard to aliens, that it should provide local means of redress for them.⁵² Indolence in the pursuit of criminals may deprive the injured alien of his opportunity for redress under domestic law, and justify the interposition of his state in his behalf.⁵³ The alien must be allowed access to the courts to initiate civil proceedings against those who have wronged him; and the state itself must initiate criminal proceedings against those who have committed crimes against the

⁵⁰ See Reply No. 5 of the Committee of Jurists appointed by the Council of the League of Nations, to study the questions of responsibility arising out of the murder of General Tellini in Greece: "The recognized public character of the foreigner and circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance in his behalf," *Official Journal*, League of Nations, V, p. 524.

⁵¹ Mr. Fish to Mr. Partridge, March 5, 1875, Moore, *Digest*, VI, p. 816; Turkish cases cited, *ibid.*, VI, § 1030; *Donougho Case*, Moore, *Arbitrations*, p. 3014; *Jean-notat Case*, *ibid.*, p. 3674.

⁵² The rule of local redress will be discussed in the following chapter.

⁵³ In the recent *Janes Case*, before the General Claims Commission, United States and Mexico, an award of \$12,000 was made because "the Mexican authorities did not take proper steps to apprehend and punish the slayer of Janes," Docket No. 168, Sec. 18. See the *Diaz Case*, Docket No. 293, and the *Massey Case*, Docket No. 352, before the same commission; *Poggioli Case*, Ralston, *Venezuelan Arbitrations*, p. 869; *Piedras Negras Claims*, Moore, *Arbitrations*, p. 3036; *Lenz and Renton Cases*, Moore, *Digest*, VI, pp. 792, 794.

alien.⁵⁴ A refusal to perform the latter duty, or undue delay or unfairness in its performance, may render the state responsible.⁵⁵ He is, in general, entitled to as much protection as the ordinary citizen of the state of his residence would receive, and perhaps to more, if the judicial standards of this state are not sufficiently high. The failure of the court to give him this treatment constitutes a "denial of justice," which is a term of such importance and of such controversial character as to deserve separate treatment in the following chapter.

§ 29. The state, it may be said in summary, is, with the occasional exception of acts of individuals directed against foreign governments, not responsible for acts of individuals, except when it has failed in its duties of prevention and punishment, of restraint and redress. The state has an original duty of prevention; and its obligation may even anticipate the commission of an injury against an alien. While, as a matter of statistical calculation, the responsibility of the state usually appears after its local machinery of redress has failed to give satisfaction, it can not be admitted that the state is, in principle, never liable before that point. It is conceivable that its liability may have existed from the moment the alien was injured. But it is ordinarily true that the responsibility of the state appears as the result of a failure in duties in redress, rather than in duties of restraint.

⁵⁴ "In the case in question the State would not be fulfilling its duty towards other States if it did not allow foreigners to have access to its courts on the same terms as its own nationals, or if these courts refused to proceed with an action brought by a foreigner in defense of the rights which are granted to him and through the means of recourse which are provided under the domestic law," Committee for Progressive Codification, *Responsibility*, p. 10. See *Bovallins and Hedlund Case*, Ralston, *Venezuelan Arbitrations*, p. 952; Mr. Bayard to Mr. Buck, November 1, 1886, Moore, *Digest*, VI, p. 267.

⁵⁵ Diligence in prosecution has been an important basis of decision in many cases before the General Claims Commission, U. S. and Mexico. The following cases may be noted: *Neer*, Docket No. 136; *Youmans*, No. 271; *Quintanilla*, No. 532; *Galvan*, No. 752; *Richards*, No. 22; *Kennedy*, No. 7. In the *Cases of Labaree, Lenz, and Renton*, every opportunity was given for local action before redress was asked, Moore, *Digest*, VI, pp. 807, 792, 796. See the argument of Mariscal concerning the murder of the *Mexican Shepherds* in Texas, *ibid.*, VI, p. 789. Mr. Hyde criticizes the argument of Secretary Fish in this case and declares: "The public duty to prosecute embraced the duty to investigate and make reasonable efforts to detect the murderers. . . . Failure, however, in this regard, did not shift to the Mexican government or to interested friends of the victim the burden of securing evidence sufficient to justify complaints on information under oath specifying the offenders," *International Law*, I, p. 512, note 3. See Mr. Fish to Mr. Foster, August 15, 1873, Moore, *Digest*, VI, p. 678; *Ruden Case*, Moore, *Arbitrations*, p. 1653; *Johnson Case*, *ibid.*, p. 1656; *Piedras Negras Claims*, *ibid.*, p. 3036.

Whether the state be regarded as responsible for its own acts alone, acts of omission; or whether it be regarded as responsible for the acts of individuals if a fault on the part of the state is added, is of little consequence. The latter theory would seem to fit more easily into the theory of territorial control upon which the responsibility of the state is founded; but the practice of states apparently affirms that no violation of international law has occurred on the part of a state until, by its own act or omission, the state has made itself responsible. While it might appear to follow from the exclusive control which the state has over its own territories that it should be responsible for all injurious acts occurring therein, the community of nations, with a proper understanding of the imperfections of human endeavor, has alleviated the force of the principle in practice by the rules of due diligence and of local redress.⁵⁸ Since the state may be held responsible only for a violation of international law, it becomes necessary to ascertain, with as much exactness as possible, the attitude which it must assume toward individuals who have been wronged; and to differentiate between the procedural aspects of these two rules and the responsibility which is in principle imputable to the state.

⁵⁸ "Cependant, comme il est impossible à l'État le mieux réglé, au souverain le plus vigilant et le plus absolu, de modérer à sa volonté toutes les actions de ses sujets, de les contenir en toute occasion dans la plus exacte obéissance, il serait injuste d'imputer à la Nation, ou au souverain, toutes les fautes des citoyens," Vattel, *Droit des Gens*, II, VI, 73. See Hall, *International Law*, pp. 64-65, 269-270; *Aigues-Mortes Case*, *R. D. I. P.*, I, p. 176; Schoen, *Haftung*, pp. 40, 63.

CHAPTER V

THE RULE OF LOCAL REDRESS

§ 30. Substantively, it has been seen in the chapters above, the establishment of responsibility is contingent upon the imputation of an illegal act or omission to a state, through its agents, even though the injury originated in the act of an individual. The state is responsible, in theory, for all internationally illegal injuries committed within its territories, since its exclusive jurisdiction permits no protection to be extended therein by other states. In practice, however, the harshness of such a principle is mitigated by the right which the state enjoys to employ its own agencies for the repair of the damage done. Since the state is given this power, it must be permitted to use it; and the rule is consequently found that local remedies must be exhausted by the injured alien before his state may interpose in his behalf. It will be seen that in cases in which an alien, and in many of those in which the state itself, is injured, no international delict is established, and therefore no responsibility, until the state's own machinery of justice has failed to function properly, or a denial of justice is apparent.¹ In the application of the principle of responsibility to practice, two rules are of great importance: the rule of local redress; and the measure of due diligence.

Procedurally, the rule that local remedial measures must be fully tested before diplomatic interposition is permissible is the most important rule in the application of the doctrine of state responsibility. Though, as has been seen, there are some cases in which a state injured in its own right must submit also to the regulation, it

¹ One may say that no delict has been committed for which the state is responsible until its own agencies have participated either positively or by omission; or one may say that the state is responsible for the act of the individual, but is allowed to repair such act by its own agencies in the first place. *Cf.* the argument as to whether a killing in self-defense is a crime for which the actor is excused, or is no crime at all. The actual decision of the case will be the same, whichever theory is taken. It is usually said, however, that the act of the individual produces no responsibility on the part of his state until the state fails to repair it. But note the statement in *Jonathan Broxon v. U. S.*, quoted in note 25, p. 83, *supra*; by Garner, in *Proc. Am. Soc.*, 1927, p. 56; and study carefully the quotation from Hall in note 43, p. 18, *supra*.

usually applies to injuries suffered by aliens. So far as its own citizens are concerned, it is, ordinarily, of little interest to international law what sort of justice a state may mete out to them;² but, for the alien, that law demands a certain standard of justice. When an alien takes up residence in a state, he submits himself to the local law. This follows naturally from the principle of exclusive jurisdiction; and his own state will usually give full credit to the protective system of the state in which he is resident. This protective system the state is obliged by international law to have; and, before it, the alien is required to seek relief for an injury done to him. Until he has done so—until he has “exhausted local remedies”—he cannot appeal to diplomatic action.³ This rule is thoroughly established in the practice of nations. It has often been asserted in the diplomatic correspondence of states;⁴ and in arbitral

² Except in so far as the mistreatment of its own citizens reveals a tendency to treat aliens in the same fashion, or furnishes evidence of a failure to measure up to the international standard.

³ Exceptions will be noted in subsequent paragraphs.

⁴ It is a logical principle that where there is a judicial remedy, it must be sought. Only if sought in vain and a denial of justice established, does diplomatic interposition become proper,” Borchard, *Diplomatic Protection*, p. 818; and he adds in a footnote: “This principle is so thoroughly established that the detailed citation of authorities seems hardly necessary.” See Article 12 of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

“The establishment of responsibility imposes upon the territorial sovereign the duty either to obtain the victim a means of obtaining redress by some reasonable process, or, in lieu thereof, to make reparation upon the demand of the State of which the victim is a national. The propriety of interposition, therefore, seems to depend upon the alternative the delinquent State has chosen,” Hyde, *International Law*, I, p. 493.

A large number of recent treaties of arbitration and conciliation embody the rule. See, for example, the treaty between Switzerland and Germany, 1921, League of Nations, *Treaty Series*, No. 320, Art. 3; and the treaties annexed to the Locarno Pact.

⁴ Section 8 of the General Instructions for Claimants, U. S. Department of State, Revision of January 30, 1920, advises: “If any legal remedies for obtaining satisfaction for, or settlement of, the losses or injuries sustained are afforded by a foreign Government before its judicial or administrative tribunals, boards or officials, interested persons must ordinarily have recourse to and exhaust proceedings before such tribunals, boards or officials as may be established or designated by the foreign Government and open to claimants for the adjustment of their claims and disputes.”

“His Majesty’s Government attaches the utmost importance to the maintenance of the rule that, when an effective mode of redress is open to individuals in the courts of a civilized country by which they can obtain adequate satisfaction for any invasion of their rights, redress must be had to the mode of redress so provided before there is any scope for diplomatic action. This is the course which His Majesty’s Government have always themselves endeavored to follow in previous wars in which Great Britain has been neutral, and they have done so because it is the only principle which is correct in theory and which operates with justice and impartiality between the more powerful and the weaker nations,” note of the English Foreign Secretary of April 24, 1916, *A. J.*, X, Supplement, p. 139. “A neutral aggrieved by any acts of

decisions, though these must be read in careful conjunction with the treaties providing for the arbitrations.⁵ For injuries suffered at the hands of agents of the state, as well as those due to the acts of individuals, the alien must employ the local machinery for redress if any exists.⁶

§ 31. This does not mean, however, that responsibility does, or does not, exist. Responsibility arises from an internationally illegal

a belligerent Power cognisable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Court of the belligerent Power," *The Zamora*, Grant, *Prize Cases*, III, p. 13.

"A foreigner before he applies for extraordinary interposition, should use his best endeavors to obtain the justice he claims from the ordinary tribunals of the country," Mr. Jefferson to the British Minister, April 18, 1793, Moore, *Digest*, VI, p. 259. See in general, *ibid.*, § 913 and § 987, more particularly, Mr. Forsyth to Mr. Welsh, March 14, 1835, *ibid.*, VI, p. 261; *Case of the Reverend Jonas King*, *ibid.*, VI, p. 262; Mr. Davis to Mr. Taylor, October 20, 1871, *ibid.*, VI, p. 661; and *Tunstall's Case*, *ibid.*, VI, pp. 662-666. Also, Wharton, *Digest*, II, § 230; *For. Rel.*, 1911, p. 643; 1912, p. 939; Lapradelle-Politis, *Recueil*, II, p. 710, and references in note 3.

⁵In many cases, arbitral opinions have rejected claims because the claimants had not sought redress for their injuries in local courts. "In such cases the umpire is of opinion that in order to make the Mexican Government responsible there must be the clearest proof of a denial of justice. But there is no such proof in this case. On the contrary, the claimant did not avail himself of the judicial remedies which were within his reach; for there is no doubt that if he was so convinced that the judge had acted unjustly and illegally, it was in his power to proceed against him in the supreme court," *Burn Case*, Moore, *Arbitrations*, p. 3140. See among many others the *Bensley Cases*, *ibid.*, pp. 3016-3018; *Lagueneue*, *ibid.*, p. 3028; *Baldwin*, *ibid.*, p. 3127; *Selkirk*, *ibid.*, p. 3130; *Leichardt*, *ibid.*, p. 3133; *Jennings*, *Laughland and Co.*, *ibid.*, p. 3135; *Slocum*, *ibid.*, p. 3140; *Ada*, *ibid.*, p. 3143; *Smith*, *ibid.*, p. 3146; *La Guaira*, *Ralston*, *Venezuelan Arbitrations*, p. 182; *de Caro*, *ibid.*, p. 819; *Poggioli*, *ibid.*, p. 867; *Canadian Claims for Refund of Hay Duties*, British American Claims Commission, March 19, 1925, *A. J.*, XIX, pp. 797, 799; *The R. T. Roy*, *ibid.*, p. 802; *Adolph G. Studer*, *ibid.*, p. 794.

The rule is so strongly established that when it is desired to disregard it, a specific statement to that effect is inserted in the *compromis d'arbitrage*. See Art. V of the General Claims Convention, U. S. and Mexico, *Treaty Series No. 678*: "The High Contracting Parties . . . agree that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim." Also, Special Agreement for the Submission to Arbitration of Pecuniary Claims, 1910, Malloy, *Treaties*, III, p. 2625, Art. IV. "Arbitrators have sometimes reasoned that the very submission of the claims to arbitration presupposed the intention of the contracting governments to dispense with the rule," Borchard, *Diplomatic Protection*, p. 819.

⁶It has already been seen that the rule of local redress applies to acts of agents as well as of individuals. See Chapter IV, *supra*, and especially § 14.

"For it is an admitted principle of international law, that parties who are aggrieved by the unlawful acts of a public authority are bound to exhaust every legal means given by the constitution of the country to have the illegality declared and the acts overruled," *Capitation Tax Case*, Moore, *Arbitrations*, p. 1414. See also *Cramer's Case*, *ibid.*, p. 3251; and the *Bensley*, *Baldwin*, *Selkirk*, *Leichardt*, *Slocum*, and *Ada Cases* cited in foot-note 5 above.

act, and is not necessarily contingent upon local redress. Whether responsibility appears with the failure of local remedies or before that time, depends upon whether an illegality has been apparent before, or whether the failure of the local remedies constitutes in itself the first illegality. A clear statement is given by Mr. Hyde:

Whether the act of a State constitutes a denial of justice depends solely upon the quality of lawfulness or unlawfulness which international law attaches to the act, and not upon the means of redress afforded the individual against whom it was directed. While the adequacy of those means vitally affects the propriety of interposition, it is unrelated to the character of the conduct giving rise to the complaint. . . . The inquiry as to national responsibility is distinct from that respecting the propriety of interposition. . . . Thus, in the examination of claims, it becomes important to distinguish events which tend to show internationally illegal conduct on the part of a territorial sovereign from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct. The former serves to establish national responsibility; the latter to justify interposition.⁷

The two situations must be carefully differentiated; and their interrelationship is confusing because local remedies serve both as a means of reparation, and, in their failure, as a source of responsibility. Thus, for the internationally illegal conduct of an agent of the state, the state becomes at once responsible; whereas it is usually said that an individual cannot, merely by doing harm to an alien, commit an international illegality for which the state is responsible. However, the procedure to be followed by the alien is the same in either case; he must seek relief against either the state agent or the individual in the local courts.

Some difficulty arises from the double function served by local remedies. They may be regarded, on the one hand, as a means of repairing a breach of international law for which responsibility is already existent; and, on the other hand, as a duty whose improper execution will itself bring responsibility upon the state. It cannot

⁷ Hyde, *International Law*, I, pp. 492-493; and see also pp. 509, 510, 474. It should be observed that by "denial of justice" Dr. Hyde means any international illegality. Strupp differentiates between acts of commission, for which the state is responsible at once, and acts of omission, for which the state is responsible only if fault is to be found in its measures of local redress, *Völkerrechtliche Delikt*, pp. 34-35, 53-54. See Decencière-Ferrandière, *Responsabilité*, p. 101; Wright, *Enforcement*, pp. 93-94; Article 12 of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

be said that responsibility appears only when local remedies have failed. The responsibility of the state may have been called into existence as a result of a previous illegality, in which case the failure of local remedies serves only to justify an appeal to diplomatic interposition. If, however, the local measures of redress operate regularly to afford the alien the reparation which the law of the land permits, responsibility is thereby discharged. Again, if the alien has received an injury which is not in itself internationally illegal, his failure to secure proper redress from the state may at this point, for the first time, engage the responsibility of the state. Whether the state has an anterior responsibility or not, it must usually be permitted to use its own agencies of redress where it has provided them; and the failure of these agencies may either create an original responsibility where none has existed hitherto, or serve to carry the case on to diplomatic procedure if responsibility was already engaged.⁸

While the mere fact that its local remedies have been called into play does not necessarily mean that the responsibility of the state has been engaged, procedurally such local remedies must always be resorted to, where provided, by the injured alien. The variety of provisions made by the different states adds to the confusion of thought. It would probably be found to be true that municipal law offers more protection against acts of individuals than against acts of state agents; and that acts of minor officials are likewise better guarded against than acts of higher officials. Again, in those countries in which such matters are dealt with by administrative law, the rule of local redress may operate to make the state itself responsible under municipal law as well as, or rather than, under international law, and can only be reduced to a consistent theory through the autonomy permitted a state under the rule of local redress. Wherever local remedies are satisfactorily provided, they must usually be sought and exhausted by the alien; and if, in result, he would seem to receive differing treatment in different

⁸ See Hyde, *International Law*, I, p. 483; and the *Case of Jonathan Brown v. U. S. and the Brulé Sioux*, 32 Ct. Cl. 433, quoted in note 25, Chapter IV, *supra*. "It is true that the municipal enforcement of the duty to make indemnity incumbent upon the immediate perpetrators of the wrong is often used as a basis for denying the duty of 'reparation' altogether, using the term to signify solely an indemnification by the government of the state at fault. This view is believed to be untenable," Wright, *Enforcement*, pp. 93-94.

countries, it must be remembered that the scope of the rule is steadily widening, and that the requirement of an international standard is producing a constantly increasing and desirable uniformity in the administration of justice throughout the world, which not only serves the needs of international intercourse, but frequently ameliorates the position of the citizen of a state under his own law. The tendency to widen the range of the rule, noticeable in various instances, is worthy of encouragement.⁹

§ 32. The rule of local redress is indeed, in the present theory of international organization, of fundamental and essential value.¹⁰ It reconciles national autonomy and international co-operation into a sort of a federal system by which a happy compromise is effected between the two forces which have produced international law. It represents, upon the one hand, the establishment of certain rights under international law and certain duties imposed by it; and on the other hand, it represents the claim of the state to exclusive control within its boundaries. It illustrates the theory which is at the present time back of the entire system of international law—the theory of international co-operation, as opposed to the Austinian conception of a higher power. Each state accepts, within the broadest possible limits, the justice provided by other states; and thus the rule builds up faith and credit among nations. In the absence of an international organization with the machinery to reach down to the individuals within a state, as does our Federal government, it is essential that the machinery of the various states should be employed for the execution of international law; and this method

⁹ Instances have been given, such as the Act of Anne, or the amendment of our Habeas Corpus Act following the *McLeod Case*, which reveal the effect of international requirements upon domestic systems. It is now possible to secure redress against states themselves, through Courts of Claims and other agencies. See Wright, *Enforcement*, p. 101; Hyde, *International Law*, I, § 282.

¹⁰ "There are several reasons for this limitation upon diplomatic protection; first, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local state in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all international discussion; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the state; and fifthly, if it is the deliberate act of the state, that the state is willing to leave the wrong unrighted," Borchard, *Diplomatic Protection*, p. 817.

fits in with current theories of political organization, certainly in the international realm, and perhaps in that of domestic organization as well.

On the one hand, the operation of the rule makes it impossible for a theory of absolute and irresponsible sovereignty to be set up as a barrier to the proper administration of international justice. The state is obligated to provide a certain amount of protection against the reckless acts of individuals within its jurisdiction, or acts of its agents which might do harm to those who have been admitted within its borders. If it does not provide such protection, it is unfaithful to its obligations to the society of nations, and its liability for the consequences of its laches may be great. If it does provide the proper machinery, the diligence with which this machinery is operated is carefully observed, and held up to a required standard. It is well established that a state cannot conceal itself behind a mystic cloak of sovereignty and assert that its law is sufficient, and that the alien must be satisfied with whatever fate is dealt to him by the law. On the contrary, the state must proceed in accordance with its international obligations; and it cannot reject this duty, incumbent upon it from the moment of its accession to membership in the family of nations.

On the other hand, the rule takes into account both the independence of states, and the impossibility of maintaining a perfect control over individuals within them. No effort is made to direct the choice of the machinery by which the state is to perform its duty of protection: it is free to adopt such a form as seems best to accord with its own ideals, and this freedom is carried to such extent as to produce apparent contradictions or inconsistencies in the interpretation of the rule. The state is judged by results, not by methods. And since it would be beyond the range of possibilities for a state either to assure itself of the complete integrity of all its numerous agents, or to restrain all possible individual acts of injury, the fallibility of human beings is taken into account by the rule; and the state is held responsible only for a proper diligence in its enforcement. It can not yet be admitted that the conception of the state as a collectivity responsible for all the doings of all its members has taken root in international law; and it would be unjust to hold the state to a complete and unreckoning liability to material reparation for acts of its agents or individuals toward

aliens, when no state is able to prevent such acts toward its own citizens. It can only be stated as a general theory, based upon the exclusive control which it enjoys, that the state is responsible for internationally injurious acts or omissions; and then diminish its actual liability, perhaps even to the vanishing point, according to the efficiency of the machinery which it employs, and the diligence it uses in seeking to restrain such acts.

Finally, the application of the rule serves to further convenience in international intercourse. For one thing, it facilitates enormously the conduct of diplomatic business. If every alien who suffers injury should resort to his own home government for redress, the channels of diplomatic communication would be hopelessly clogged, and chancelleries would be faced with an intolerable burden of work.¹¹ The devolution of the task upon the separate states not only divides the labor, but makes possible a more accurate determination of the facts of the cases, in the situation where they occurred. Again, a desirable uniformity of standards in the administration of justice is produced. The domestic standard is frequently found to be deficient, or the machinery poorly organized for the purpose; and changes must be made in order to satisfy the requirements of international law. While there is admittedly much opportunity for abuse here, in the present organization of the community of nations, there are also great potentialities for compelling the maintenance of better standards of justice within countries which may have been remiss in this respect, to the advantage not only of aliens, but of the nationals themselves. As judicial standards more and more approach uniformity within the different states, intercourse between states through the interchange of inhabitants and articles of commerce is more unobstructed and encouraged, and the community of nations becomes more homogenous and less subject to the psychological reactions produced by ignorance.

¹¹ "It would be an unreasonable and oppressive burden upon the intercourse between nations that they should be compelled to investigate and determine, in the first instance, every personal offense committed by the citizens of the one against the other," Mr. McLane to Mr. Shain, May 28, 1834, Moore, *Digest*, VI, p. 258. "If the complaints of the people of the two nations against each other along the Canada frontier, properly cognizable in the courts of justice of either, were in the first instance to become subjects of international interposition, there would be no end of the difficulties and embarrassments which must result from such a practice," Mr. Buchanan to Mr. Pakenham, December 26, 1846, *ibid.*, p. 659. See also Wright, *Enforcement*, p. 94.

§ 33. The rule of local redress has thus far been stated as requiring the injured alien to exhaust local remedies wherever they are provided, and as relieving the state of responsibility for the acts of individuals through the operation of these remedies. Obviously, it would be absurd to be content with so positive and uncompromising a statement as this. It would be possible for any state to hide itself behind its municipal codes and, with the assertion that its own laws had been properly enforced, to refuse to allow any intervention on behalf of the alien by his state. It now becomes necessary to examine the cross-checks upon, and exceptions to, the rule of local redress, which permit of diplomatic interposition, and through which the autonomous execution of the rules of international law are kept up to the requisite standard. It has already been observed that acts which injure the state itself, by threatening or damaging its existence or honor, may be at once taken up by diplomatic procedure.¹² Thus, Austria resented to the extent of an ultimatum, which produced a great war, the preparation upon Serbian soil of attacks against her government; and, far from accepting the action of Serbian courts as sufficient redress, demanded that her own representatives sit in Serbian courts. Violations of territorial jurisdiction, such as the affair between Bulgaria and Greece in 1925; anti-national movements, such as the murder of General Tellini in Greece in 1923; and other such political offenses, may occasion diplomatic and even stronger action at once. These will be passed by, and attention directed to cases in which aliens are injured, and no offense to a state appears.

Diplomatic interposition may occur as the result of one of two further situations: when the measures of local redress, even though efficiently and correctly administered according to the domestic law, do not attain the standards set by international law; or when, in a system which is admittedly adequate, there may be an improper application of the domestic laws themselves.

To satisfy the international standard, the state must, as was seen in Chapter IV, provide the necessary and proper machinery for repairing the injuries suffered by individuals within its jurisdiction. If, in attempting to secure redress, the efforts of the alien reveal the absence of necessary legislation, his state may at once intervene

¹² See Section 25, *supra*, p. 80.

in his behalf.¹³ Manifestly, where local remedies do not exist, they can not be sought; or, in the well-known words of Secretary Fish:

A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust.¹⁴

The opportunities for local redress afforded by various states differ widely. Constant civil disturbances and poorly organized systems of government have in some states resulted in frequent interpositions and interventions, sometimes unwarranted, by foreign states in behalf of their citizens. As a result, these states have attempted to protect themselves by the rigid application of the rule that the alien must seek redress for his injuries in local courts, before the alien's government may take up his claim by diplomatic procedure. They attempt to limit even further the right of interposition by defining denial of justice as a refusal of access to the courts, and thus barring any question as to the standard of justice actually administered within the state. Behind this position, which is taken for the most part by Latin-American states, stands the Calvo Doctrine, which has come to represent generally the theory

¹³ "In countries where well-defined and established laws are in operation, and where their administration is committed to able and independent judges, cases will rarely occur where such intervention will be necessary. But these elements of confidence and security are not everywhere found, and where that is unfortunately the case the United States are called upon to be more vigilant in watching over their citizens, and to interpose efficiently for their protection when they are subjected to tortious proceedings, by the direct action of the government, or by its indisposition or inability to discharge its duties," Mr. Cass to Mr. Lamar, July 25, 1858, Moore, *Digest*, VI, p. 723. See also Mr. Cass to Mr. Dimitry, May 3, 1860, *ibid.*, p. 287; Mr. Bayard to Mr. Buck, November 1, 1886, *ibid.*, p. 267; Mr. Fish to Mr. Foster, August 15, 1873, *ibid.*, VI, p. 678; Mr. Bayard to Mr. Jackson, September 7, 1886, *ibid.*, VI, p. 680; Mr. Blaine to Mr. Dougherty, January 5, 1891, *ibid.*, VI, p. 805.

"The creator of the methods and means of internal administration, viz., the nation, must always be responsible to the other government for the creatures of its creation," *Davy Case*, Ralston, *Venezuelan Arbitrations*, p. 411. And see *Bullis Case*, *ibid.*, p. 170; *Aroa Mines Case*, *ibid.*, p. 378; *Pratt's Case* (1871), Moore, *Arbitrations*, p. 3281; *Idler Case*, *ibid.*, p. 3516; *Cotesworth and Powell Case*, *ibid.*, p. 2081; Pinkney's Opinion in *Case of the Neptune*, *ibid.*, p. 3086.

See quotation given in note 4, p. 96, *supra*, as to the grounds for application to the Department of State for a claim against another state because of injurious actions by a foreign judicial tribunal; Borchard, *Diplomatic Protection*, pp. 821-822; Hyde, *International Law*, I, pp. 470, 496.

¹⁴ Mr. Fish to Mr. Pile, May 29, 1873, Moore, *Digest*, VI, p. 677; *Idler Case*, Moore, *Arbitrations*, pp. 3491, 3508; *Queen*, Lapradelle-Politis, *Recueil*, II, pp. 710-711. See also Article 5, Cl. 1, of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

that the decisions of local courts with regard to aliens are final.¹⁵ Clauses to this effect are found in constitutions, in treaties, in statutes, and in contracts.¹⁶ In the *Aroa Mines Case*, a clause from the Venezuelan Constitution was under discussion:

International law is supplementary to national legislation; but it can never be invoked against the provisions of this Constitution and the individual rights which it guarantees.¹⁷

More specifically, the law of Salvador, of September 27, 1886, stated:

Article 39. Only in the event of a denial, or of a voluntary retardation in the administration of justice, and after having resorted in vain to all the ordinary means established by the laws of the Republic, may foreigners appeal to the diplomatic recourse.¹⁸

Similar provisions are found in treaties and in contracts.¹⁹ In the case of treaties, which involve mutual agreement, such a restriction may be regarded as legally valid, however unwise it may be.

But unilateral restrictions by constitutional or legislative action,

¹⁵ Calvo's own statement of his theory is not convenient for quotation. It will be found in his *Droit International*, III, Liv. XV, especially § 1280. It is summarized as follows by Hershey: "He absolutely denies that a government is responsible by way of indemnity for any losses or injuries sustained by foreigners in time of internal troubles, civil war, or for injuries resulting from mob violence (provided the government is not at fault) on the grounds that the admission of such a principle of responsibility would establish an unjustifiable inequality between nationals and foreigners and would undermine the independence of weaker states. He does not even admit that the ordinary channels of diplomacy are open to claimants in such cases," *A. J.*, I, p. 31. See also *Aroa Mines Case*, Ralston, *Venezuelan Arbitrations*, p. 375.

¹⁶ Good discussions of the various ingenious methods by which it has been attempted to evade intervention may be found in Goebel, "The International Responsibility of States for Injuries Sustained by Aliens on account of Mob Violence, Insurrections and Civil Wars," *A. J.*, VIII, pp. 831-838; and in Borchard, *Diplomatic Protection*, p. 836, Chapter VII, entitled, "Limitations arising out of Municipal Legislation of the Defendant State."

¹⁷ Quoted by Umpire Plumley in Ralston, *Venezuelan Arbitrations*, p. 376.

¹⁸ Moore, *Digest*, VI, p. 269. For other examples, see *ibid.*, VI, § 919; law of Ecuador, 1892, 84 *Br. and For. St. Pap.*, p. 645; of Bolivia, *For. Rel.*, 1871, p. 29; and references given by Borchard, *Diplomatic Protection*, p. 842 *et seq.*

¹⁹ Contract clauses will be discussed in Chapter VII. Treaties to this effect are discouraged by the Institute of International Law, *Annuaire de l'Institut*, XVIII, p. 252, translated in Moore, *Digest*, VI, p. 323. See opinion of *General Claims Commission, U. S. and Mexico, Case of N. A. Dredging Co.*, March 31, 1926, p. 5. According to Mr. Borchard, the United States and Great Britain have with rare exceptions refused to conclude such treaties, *Diplomatic Protection*, pp. 847, 820, and 843.

or the contractual renunciation by an alien of his nation's support, can not serve to limit international responsibility.²⁰ The United States, says Mr. Borchard,

has never receded from its position that a citizen's right to ask the protection of his government does not depend upon the local laws, but upon the law of his own country, and that the limits of diplomatic protection are fixed by international law without possibility of restriction by municipal legislation.²¹

An emphatic statement to this effect was made by the Department of State in *Wheelock's Case*:

A foreigner's right to ask and receive the protection of his government does not depend upon the local law, but upon the law of his own country. . . . Such a [local] law cannot control the action or duty of his government, for governments are bound among themselves only by treaties or by the recognized law of nations and there is nothing in the existing treaties between the two countries or in the law of nations which recognizes as pertaining to Venezuela the right by the enactment of a municipal law to say how, or where, or under what circumstances the government of the United States may or may not ask justice in behalf of one of its own citizens.²²

European states as well refuse to accept such municipal limitations.²³

²⁰ The general proposition that municipal legislation cannot limit an international claim has been discussed in Sec. 21, *supra*. "It cannot be admitted that a State may by local enactment lessen the scope of its duty of jurisdiction, inasmuch as it is always fixed by international law. Thus the effort to restrict by local legislation the measure of justice to be accorded the resident alien, or the right of his State to interpose in his behalf, is commonly protested against by the country whose national is thus adversely affected," Hyde, *International Law*, I, p. 467. See Schoen, *Haftung*, p. 84, and note 6; Strupp, *Völkerrechtliche Delikte*, pp. 79-80 and notes; Borchard, in *A. J.*, XX, pp. 738, 740.

²¹ Borchard, *Diplomatic Protection*, p. 845.

²² Mr. Frelinghuysen to Mr. Soteldo, April 4, 1884, Moore, *Digest*, VI, p. 321. "The United States, for instance, would not be precluded from calling on Costa Rica for redress for injuries inflicted on a citizen of the United States by Costa Rica by the fact that the latter state had adopted a law to the effect that no such claims are to be entertained. By the law of nations, the United States have a right to insist upon such claims whenever they hold that such redress should be given; and they would not regard a statute providing that such claims were not to be the subject of diplomatic action as in any way an obstacle to their taking such action," Mr. Bayard to Mr. Hall, February 16, 1887, Moore, *Digest*, VI, p. 269. Other examples of the attitude of the United States will be found in *ibid.*, § 919; *Foreign Relations*, 1888, I, pp. 490-492 (Ecuador); 1887, pp. 245-250; 1888, II, p. 1599 (Turkey); 1896, p. 677 (Cuba).

²³ The German attitude toward legislation embodying the Calvo Doctrine appears

As a matter of fact, the Calvo Doctrine is simply a restatement of the rule of local redress in such extreme form that it can not be admitted. The controversy which has arisen over this proposition is not so much one of principle as of degree. The South American publicists would hold that the alien must be satisfied with the local remedies provided; their opponents, that the alien need be satisfied with such remedies only if they measure up to an international standard of justice. The *desiderata* of the Calvo Doctrine are daily attained in states with satisfactory administration of justice; but past experience with certain states has not created a confidence in their ability to assure justice to aliens. When ample means of obtaining redress are guaranteed to aliens in those states, there will be no need of such a doctrine; but, until this is done, others are not likely to withhold the exercise of the right of interposition in behalf of their nationals who, while perhaps receiving the usual measure of justice within such states, have not been granted "a reasonable standard of civilized justice."²⁴

in the note of the German ambassador to Venezuela, February 13, 1902, Ralston, *Venezuelan Arbitrations*, p. 967; and in the dispatch of Mr. Loomis to Mr. Hay, June 5, 1900, Moore, *Digest*, VI, p. 300. The British Government "reserves the right to object to any claim on the part of Venezuela at any future time to having released itself, by its own decree, from responsibility to Great Britain as to the injustice or damages caused to British subjects for which Venezuela would be bound to give indemnization either by reason of the law of nations in general or by virtue of the provisions of treaties," Ralston, *Venezuelan Arbitrations*, p. 975. See discussion by Umpire Plumley in *Aroa Mines Case*, *ibid.*, pp. 365-379.

²⁴ "Manifestly it is impossible for this Commission to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo Clause, which may be found in contracts, decrees, statutes, or constitutions and under widely varying conditions. Whenever such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizens whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void," *General Claims Commission, U. S. and Mexico, Case of N. A. Dredging Co.*, March 31, 1926, Sec. 22. See also Sec. 9: "The Commission does not hesitate to declare that there exists no international rule prohibiting the sovereign right of a nation to protect its citizens abroad from being subject to any limitation whatsoever under any circumstances."

The attitude of the Committee on Progressive Codification on this important matter is not clear. In general, it appears to support the Latin-American position. (The *rapporteur* of the subcommittee on Responsibility, M. Guerrero, is a Salvadorean; and the other two members, M. de Visscher and Mr. Wang Chung-Hui, were absent.) Thus, it is asserted (p. 13) that "The States of Latin-America have acted wisely in endeavoring to secure protection for their legitimate rights by means of treaty provisions," though, as has been seen, the *Institut de Droit International* deprecated such treaties. Again, it asseverates that no international recourse is admissible against municipal judgments (p. 10), which is quite in contradiction to the practice of states. (See Sec. 22, *supra*.) M. Guerrero admits international responsibility only if there

This standard is not, of course, applied merely to Latin-American states. It was in support of this principle that Palmerston made his famous speech with regard to Don Pacifico;²⁵ and it is asserted, when occasion arises, against great states as well as small. Mr. Hyde declares that "the tribunals and processes found adequate for the exercise of jurisdiction with respect to the latter [the citizen] may notoriously fail when the complainant is an alien and local prejudice is aroused against him;"²⁶ and the failure of justice due to jury trial within the district where the injury to the alien was committed has on more than one occasion forced the United States to pay an indemnity. Certainly it would not be admitted

has been a denial of justice; and limits this term to "a refusal to grant foreigners free access to the courts" (pp. 10-11). "The affording of protection," he claims, "is an element of national law, a field in which the will of the State is the supreme arbiter" (p. 5). On the other hand, he admits (p. 6) that "responsibility may be incurred by failure to adopt methods which should have been adopted or by the inadequacy of the methods actually adopted."

To leave the state the supreme arbiter of the fate of aliens within its jurisdiction is contrary to all the tendencies of practice and to the dictates of humanity and the interests of his state. An international standard must be maintained, if international law is to serve any worthwhile function in international intercourse; and it is to be hoped that in the restatement of international law now in progress, more precise definition and circumscription will be given to this standard, to the end of preventing abuse, rather than that an attempt should be made to eliminate it. The present report takes an impossible position, and can not be taken to represent a sufficient agreement among nations to justify hope of being embodied in a convention. See criticism by Borchard in *A. J.*, XX, pp. 738-747, and in the debates at the 1927 session of the *Institut*.

²⁵ "I say, then, that our doctrine is, that, in the first instance, redress should be sought from the law courts of that country; but that in cases where redress can not be so had—and those cases are many—to confine a British subject to that remedy only would be to deprive him of the protection which he is entitled to receive. . . . We shall be told perhaps, that . . . foreigners have no right to be better treated than the native and have no business to complain if the same things are practiced upon them. We may be told this, but that is not my opinion, nor do I believe it is the opinion of any reasonable man," Lord Palmerston, in the House of Commons, June 25, 1850, *Moore, Digest*, VI, p. 681.

²⁶ Hyde, *International Law*, I, pp. 469-470. He points out the need of further legislation by Congress enabling the Federal Government to protect aliens in Federal Courts. See U. S. *Comp. Stat.*, 1918, § 991, Sec. 17, by which Federal District Courts are given jurisdiction over suits brought by aliens "for a tort only, in violation of the laws of nations or of a treaty of the United States." Legislation extending this jurisdiction is badly needed and has been urged in various Presidential messages. Note the action of the French legislature in taking out of the hands of juries cases involving foreign ambassadors, note 77, p. 67, *supra*; and the cases quoted by Strupp (ohne Begründung!), of French and American juries which released the murderers of Germans because of the plea that it was no crime to kill a German, *Völkerrechtliche Delikt*, p. 76, note 3. In some foreign countries, and in some states of the United States, the locality is held responsible for injuries due to mob action, Hyde, *International Law*, I, § 292; Borchard, *Diplomatic Protection*, p. 141.

by foreign states that the "lynch law," which so blackly mars the administration of justice in the United States, attains the requisite standard of civilized justice; and the United States has not succeeded in maintaining, nor does it any longer attempt to maintain, that injured states may not intervene and demand pecuniary indemnity for this failure, on the ground that the alien must be satisfied with such justice as the state provides.

It must be admitted that the indefiniteness of the standard leaves small states at the mercy of larger ones in the matter of such claims. But while the possibility of abuse thus arises, this is, after all, the usual weakness of international law; and it has the corresponding advantage of achieving improvement in the administration of justice in all states, and of tending toward a uniform protection of the individual throughout the world.²⁷

Consistent failure, on the part of a state, to administer internal justice in a satisfactory manner will produce an inclination on the part of injured states to disregard the rule of local redress, and to act more frequently through diplomatic channels. Backward states have only gradually been admitted to full rights in the community, the extraterritorial jurisdiction to which they had long been subjected being removed as their ability to give proper protection to aliens was demonstrated.²⁸ Other states, though recognized as such, have been reduced, as in the case of some of the Caribbean states, to a position of dependence, as protectorates or otherwise, because of their proved inability to offer aliens the security which international law demands for them. It has apparently been asserted, finally, that the annexation and absorption of such a state is justified.²⁹

²⁷ "It has, however, compensatory value in exerting an important influence in raising to the international standard the level of administration for everybody," Borchard, in *A. J.*, XX, p. 741; and see Lapradelle-Politis, *Recueil*, II, pp. 330-331.

²⁸ "Whenever," says Mr. Hyde, "the local judicial system serves to work injustice to the national of the territorial sovereign by failing to accord him that protection which enlightened States habitually place within the reach of their own citizens, and which therefore, it is believed that he should enjoy, it becomes apparent that the duty of jurisdiction is to be tested by a different standard," *International Law*, I, p. 468. See also Lapradelle-Politis, *Recueil*, II, pp. 32, 279; Hall, *International Law*, p. 60; Anzilotti, in *R. D. I. P.*, XIII, p. 22; and A. R. Higgins, *Proc. Am. Soc.*, 1927, p. 20.

²⁹ "And in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the state itself. Annexation by Great Britain became an act of political necessity if those principles of justice and

That the community of nations has a standard for the administration of justice towards aliens, is not to be doubted;³⁰ and if the rule of local redress, which represents the independence of states, is to be respected, a strengthening of those agencies within states is needed. It is unfortunate that the determination, or application, of this standard should be left to individual states; for the temptation to abuse is great. Until the standard is more precisely stated, and until an international organization is effected capable of giving a fair and impartial interpretation to the principle, the right of a state to intervene in disregard of local remedies, where they are insufficient, must be justified by the importance of the principle of responsibility itself.

§ 34. Ordinarily, however, it may be assumed that a state's organization is such as to enable it adequately to meet the required international standard; and the usual question which arises is as to when, granted a satisfactory local system and the consequent necessity for an alien to exhaust local remedies, it may yet be proper for him to seek the diplomatic interposition of his own state. In other words, when, aside from other elements justifying diplomatic interposition, may the operation of local remedies in a particular case be regarded as so unsatisfactory as to render diplomatic action proper? The answer, it is believed, is: when there is a denial of justice.³¹

The confusion in the use of the term 'denial of justice' doubtless explains a great deal of the uncertainty attendant upon the effort to state the principle of responsibility in rules of practice.³² While the matter may be regarded as chiefly one of terminology, it is

fair dealing which prevail in every country where property rights are respected were to be vindicated and applied in the future in this region," *R. E. Brown Claim*, Nielsen's Report, pp. 198-199, *A. J.*, XIX, p. 303.

³⁰ According to Article I of the Treaty between the United States and Germany of 1923, nationals of each state shall receive protection, "and shall enjoy in this respect that degree of protection that is required by international law," *Treaty Series*, No. 725. See the case of *Harry Roberts*, General Claims Commission, U. S. and Mexico, Docket No. 185, § 8; and Article 4, Cl. 1, of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

³¹ *Contra*, Hyde, *International Law*, I, p. 492 and note 2: "the assertion is made that no denial of justice occurs until the aggrieved alien has exhausted his judicial remedies, and the territorial sovereign charged with fault has again been found wanting through the inadequacy of its judicial system. It is believed that this contention betrays confusion of thought." Mr. Hyde is not, in this statement, denying responsibility for illegalities outside the courts, but extending denial of justice to cover them.

³² The uncertainty of the term is generally recognized. See Lapradelle-Politis, *Re-*

important that the term should have a generally accepted signification, since, for every meaning given to it, a new statement of the rules of responsibility is required. Thus, it is correct to say that a state is responsible *only* for denial of justice, if that term is understood to include *every* violation of international law to the detriment of an alien. But if, as the Latin-American states uniformly interpret it, denial of justice is to mean only the failure of the *courts* to give to the alien the ordinary municipal justice, the state may be, and is in such cases, held responsible for more than the denial of justice.³³ These two statements do, in fact, represent the two extremes in interpretation of the phrase. On the one hand, it is broadly interpreted to mean any internationally illegal conduct toward an alien; on the other hand it is limited, in greater or less degree, to the failure of the judicial process invoked by the alien in the pursuit of relief.

The former position is strongly urged by Mr. Hyde.³⁴ M. de Lapradelle seems disposed to take the same attitude, though his position is admittedly uncertain;³⁵ and Mr. Nielsen, in arguments before the American and British Claims Arbitration Tribunal, has defined denial of justice as "obvious outrage."³⁶ Some cases apparently support this interpretation.³⁷

cueil, II, pp. 31, 280; Decencière-Ferrandière, *Responsabilité*, pp. 87-88; Borchard, *Diplomatic Protection*, § 127; Hyde, *International Law*, I, p. 492 and note 3; Strupp, *Völkerrechtliche Delikt*, p. 79, note 1; Wambaugh, in *Proc. Am. Soc.*, IV, p. 128; Anzilotti, in *R. D. I. P.*, XIII, p. 22; Benjamin, *Haftung*, p. 46; Hatschek, *Völkerrecht*, p. 398.

³³ "There is a denial of justice only when the court shall refuse to make a formal decision on the principal matter in dispute, or on any incidents of the case," Law of Salvador, quoted by Penfield, *Proc. Am. Soc.*, IV, p. 139; and see Moore, *Digest*, VI, p. 269; Borchard, *Diplomatic Protection*, pp. 846, 842-843. M. Guerrero defines it as "a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although in the circumstances, nationals of the State would be entitled to such access," Committee for Progressive Codification, *Responsibility*, p. 11. The difficulty with this report is that it rejects responsibility except for denial of justice as limited in this fashion.

³⁴ "A denial of justice, in a broad sense, occurs whenever a State, through any department or agency, fails to observe with respect to an alien, any duty imposed by international law or by treaty with his country," Hyde, *International Law*, I, pp. 491, 492.

³⁵ Lapradelle-Politis, *Recueil*, doctrinal note to Croft and Yuille, *Shortridge and Co. Cases*, II, pp. 31, 33, 112. At p. 280 he speaks of "déné de justice, dont le caractère fuyant et complexe semble défier tout définition."

³⁶ Nielsen's *Report*, p. 250. He asserts also that there is no right to call a nation to account except for denial of justice, i.e., obvious outrage; but his citations refer only to judicial procedure, though perhaps as affected by legislative or executive acts.

Such a position assumes that responsibility and denial of justice are the same in content, so that only where a denial of justice is established can there be responsibility. Under such circumstances the term 'denial of justice' would appear to be superfluous and confusing, and proper to be eliminated. As a matter of fact, however, it has a useful meaning, since it describes a particular type of international illegality. In this sense, it serves a valuable purpose, and should be retained. It has been seen that responsibility may occur either before local remedies are sought, because of an international illegality; or afterwards, as the result of the failure of these remedies, thus constituting a separate delict. In the one case, the international illegality may perhaps be repaired by the local remedies offered; in the other, such reparation is impossible because it is the failure of the local remedies themselves which constitutes the delict. Here are two types of cases to be differentiated, the one a failure of due diligence, or other international illegality precedent to appeal to the courts, the latter a denial of justice.³⁸ Either

See also his separate opinion in the *Neer Case*, General Claims Commission, U. S. and Mexico, Docket No. 136. His position was rejected by the General Claims Commission, U. S. and Mexico, in the *Chattin Case*, § 11, and by the American British Claims Arbitration Tribunal, in the case of the *Cayuga Indians*, Nielsen, *Report*, pp. 249-266, especially at p. 258. On the other hand, some support is apparently to be found for it in the *James Case*, before the former commission, and in the *El Triunfo Case* (*Salvador Commercial Co.*), *For. Rel.*, 1902, 838.

³⁷ Mr. Hyde quotes the statement by Eugene Wambaugh, *Proc. Am. Soc.*, IV, 126; Mr. Bayard to Mr. McLane, June 23, 1886, Moore, *Digest*, VI, p. 266, Hyde, *International Law*, I, p. 491, note 2. The latter citation clearly refers to judicial process. Mr. Wambaugh's statement is quoted below. Mr. Nielsen cites the *Medina Case*, Moore, *Arbitrations*, p. 2317; Ralston, *International Arbitral Law and Procedure*, p. 51; the *R. E. Brown Case*, Nielsen's *Report*, p. 162; and the *Poggioli Case*, Ralston, *Venezuelan Arbitrations*, p. 869, Nielsen's *Report*, pp. 250-253; the *El Triunfo Case*, *For. Rel.*, 1902, p. 870, in his separate opinion in the *Neer Case*, General Claims Commission, U. S. and Mexico, Docket No. 136. The *Brown* and *Poggioli Cases*, which apparently support this theory, will be taken up in the following pages of this Section.

³⁸ The statement is frequently found that responsibility exists for denial of justice or other violation of international law. "The offenses complained of now are double in nature, consisting of unjust imprisonment and denial of justice," *Tagliaferro Case*, Ralston, *Venezuelan Arbitrations*, p. 765. *Chattin Case*, General Claims Commission, U. S. and Mexico, Docket No. 41; *Mallén Case*, *ibid.*, No. 2935; *Kennedy Case*, *ibid.*, Docket No. 7; *Cotesworth and Powell*, Moore, *Arbitrations*, p. 2083; *Young Smith & Co.*, *ibid.*, p. 3147; *Prize Cases*, *ibid.*, p. 3153; *Fabiani Case*, *ibid.*, p. 4895. "... if it can be proved that there has been denial of justice by the said authorities, undue delay, or violation of the principles of international law," American Institute of International Law, Project No. 16, Article 3, *A. J.*, XX, Supplement, p. 329. See also Borchard, *Diplomatic Protection*, pp. 842-843; Wambaugh, in *Proc. Am. Soc.*, IV, p. 128; Nielsen's *Report*, p. 258, Mr. Pound; Calvo, § 1263, quoted in *Poggioli Case*, Ralston, *Venezuelan Arbitrations*, p. 867.

is an illegality; and either produces responsibility. But they differ: every denial of justice is a violation of international law; but not every violation of international law chargeable to the state is a denial of justice. The obligation which a state bears toward aliens includes other duties than mere regularity of action on the part of its local courts.

It must be observed that a denial of justice can only appear in those cases in which the rule of local redress applies. It is a generally accepted principle, said Secretary Blaine, that

a denial of justice, which constitutes the true ground of formal diplomatic demands, does not exist until the remedies afforded by the laws of the country have been tried and found wanting.³⁹

The two rules are interlocking and inseparable: local remedies must be sought until a denial of justice appears; a denial of justice is a failure in local remedies. The state has the duty of allowing to aliens the same judicial protection as it gives to its own citizens; if it fails in this duty, it is guilty of a denial of justice, which is a violation of international law. It has other duties to the alien as well, though it is doubtless true that most cases are those of denial of justice. The state has, for example, the duty of using due diligence for the prevention of injury to an alien, a duty entirely different from that of redress. Where a lack of diligence is established, it may not be necessary to resort to local remedies, and consequently no denial of justice would appear; but the state might nevertheless be responsible. The failure of the United States, for instance, to give proper protection in mob cases should not be regarded as a denial of justice, but as another violation of international law. It may subsequently become responsible, if its courts fail to give redress, on another count: that of denial of justice in the courts. The former duty is measured by international law; the latter by domestic law.

A very difficult problem, arising in this connection, is given thorough analysis in the recent *Chattin Case*, before the General Claims

³⁹ Mr. Blaine to Mr. Caamano, May 19, 1890, Moore, *Digest*, VI, p. 270. See also statement by Umpire Barge in *Orinoco S. S. Co. Case*, Ralston, *Venezuelan Arbitrations*, p. 90; *Burn Case*, Moore, *Arbitrations*, p. 3140, quoted in note 5, p. 97, *supra*; *Woodruff Case*, Ralston, *Venezuelan Arbitrations*, p. 161; Oppenheim, *International Law*, I, § 262; Penfield, in *Proc. Am. Soc.*, IV, p. 139; Mr. Bayard to Mr. Morgan, May 26, 1885, Moore, *Digest*, VI, p. 294.

Commission, U. S. and Mexico, in which a concurring and a dissenting opinion present the various viewpoints, and aid in clarifying the definition of denial of justice. The Presiding Commissioner, Mr. C. Van Vollenhoven, in making the award, distinguished between "indirect governmental liability" because of lack of proper action by the judiciary in case of injuries by individuals, and a "direct responsibility" for acts of government officials. He continues:

The very name "denial of justice" (*dénégation de justice, déni de justice*) would seem inappropriate here, since the basis of claims in these cases does not lie in the fact that the courts refuse or deny redress for an injustice sustained by a foreigner because of an act of someone else, but lies in the fact that the courts themselves did injustice.

In an interesting dissenting opinion, the Mexican Commissioner points out that, if an analogy is to be made between the state's responsibility for positive acts of legislative and executive agents of the state and its responsibility for positive acts of the judicial agents of the state, it becomes equally necessary to hold the state responsible for all acts of its judges, whether in error or not, thus destroying the respect which has always been paid by arbitral tribunals to domestic courts, and reducing the respondent state to a régime of capitulations. It may be said that, upon the one hand, practice unquestionably demands that the domestic judicial system should measure up to an international standard, and that, as has also been seen, the state may still be held responsible for a "manifest injustice"; while, on the other hand, practice has consistently refused to assess responsibility for mere errors of the court, and has in general attempted to maintain the independence of domestic courts. Apparently, since denial of justice is limited to the failure of local remedies, but not necessarily, the positive or negligent injury done to the alien plaintiff (seeking redress) is denial of justice; while the same injury on the part of the judge to an alien defendant (accused himself of crime) would be manifest injustice. In the latter case, however, local remedies remain yet to be exhausted, so that no denial of justice is yet apparent, nor diplomatic interposition justifiable until such local remedies have failed. The distinction may seem meticulous, but is of value procedurally, even though it may be frequently true that no local remedies are

to be found against the judge, with the result that manifest injustice and denial of justice become practically coincident. Practice, however, does clearly make an exception for mere errors on the part of domestic courts, even though it may permit the state to be held responsible for the errors of its executive or legislative agents.

While the cases in which the term denial of justice is discussed are not always precise in meaning, in many of them the specific statement, and in almost all of them the evident implication, is that the term refers to a failure in judicial remedies.⁴⁰ Examples are rare in which the case can be interpreted as justifying a belief that any illegal act whatever toward an alien is to be called a denial of justice. The term is given a most thorough study in the *Fabiani Case*, with the following conclusion:

One comes to believe that denial of justice comprehends not only refusal of a judicial authority to exercise its functions, and notably to pass upon the petition submitted to it, but also persistent delay on its

⁴⁰ "Nothing short of convincing evidence" that an American citizen "is the victim of intentional discrimination, partiality, or other injustice on the part of the court in which the prosecution is pending, could justify diplomatic intervention in his behalf," Mr. Gresham to Mr. Morse, May 31, 1893, Moore, *Digest*, VI, p. 282. See also Mr. McLane to Mr. Shain, May 28, 1834, *ibid.*, VI, p. 259; Mr. Marcy to Mr. Jackson, November 6, 1854, *ibid.*, VI, p. 283; Mr. Bayard to Mr. Scott, June 23, 1887, *ibid.*, VI, p. 294; Mr. Evarts to Mr. Langston, April 12, 1878, *ibid.*, VI, p. 656; Mr. Marcy to Mr. Clay, May 24, 1855, *ibid.*, VI, p. 659; Mr. Olney to the President, February 5, 1896, *ibid.*, VI, p. 670; *Waller's Case*, *ibid.*, VI, p. 670; Mr. Bayard to Mr. Jackson, September 7, 1886, *ibid.*, p. 680; Mr. Forsyth to Mr. Welsh, March 14, 1835, *ibid.*, VI, p. 696; Mr. Bayard to Mr. Copeland, February 23, 1886, *ibid.*, VI, p. 699. The definition of denial of justice adopted by the *Institut* at its 1927 session refers only to judicial action and distinguishes it from manifest injustice. See Appendix III, *infra*.

In some fifty cases examined in which the term "denial of justice" occurs, and in some twenty others listed in Moore's *Arbitrations* under the chapter heading "Denial of Justice," the reference is, with only two or three exceptions, always to judicial remedies. In these cases, the distinction between "denial of justice" and "manifest injustice" is not always clear. "In refusing the relief prayed for, the officers of the judicial department were guilty of a gross denial of justice, failing, as they did, to follow the excellent laws prescribed by Venezuela," *Tagliaferro Case*, Ralston, *Venezuelan Arbitrations*, p. 765; and see *Woodruff Case*, *ibid.*, p. 161; *La Guaira Light and Power Co. Case*, *ibid.*, p. 181; *Baldwin Case*, Moore, *Arbitrations*, p. 3126; *Bronner Case*, *ibid.*, p. 3134; *Ada Case*, *ibid.*, p. 3143; *Burn Case*, *ibid.*, p. 3140; *Danford, Knowlton Co. Case*, *ibid.*, p. 3148; *Medina Case*, *ibid.*, p. 2317; *Johnson Case*, *ibid.*, p. 1656; *Cotestworth and Powell*, *ibid.*, p. 2083; *Montano Case*, *ibid.*, p. 1637; *Chattin Case*, and *Turner Case*, General Claims Commission, U. S. and Mexico, Docket Nos. 41 and 1327 (in which denial of justice is distinguished from manifest injustice); *Canadian Claim for Refund of Duties*, Nielsen's Report, p. 368; *Cayuga Indians Case*, *ibid.*, p. 329; *Croft Case*, Lapradelle-Politis, *Recueil*, II, p. 31; *Yuille, Shortridge Co.*, *ibid.*, II, p. 112; *Negotiation of Convention*, Mexican Claims Commission of 1839, *ibid.*, I, p. 446, Moore, *Arbitrations*, pp. 1216-1217.

part in pronouncing its decree. . . . In reality, the contracting parties seem to have wished to attribute to the words 'dénégations de justice' their most extended signification, and to include in them all the acts of judicial authorities implying a refusal, direct or disguised, to render justice.⁴¹

While one may not agree that this is the "most extended signification" of the phrase, it obviously excludes any but judicial action. Diplomatic statements usually connote judicial procedure; as for example, that of Secretary Olney:

This government can properly intervene where an American citizen has been actually denied justice in the courts of a foreign country.⁴²

The opinion of writers appears also to limit denial of justice to the failure to secure judicial redress. Thus Mr. Wambaugh says:

In the narrower sense, the phrase is restricted to the instances where the wrong has been done through misconduct or inaction whose nature is judicial. This restricted meaning seems to be preferable to the wider one which has just now been explained; for denial of justice, at least when the expression is used by a lawyer, naturally connotes the instrumentalities whereby normally justice is secured, that is to say, courts and judicial procedure.⁴³

On the other hand, the extreme interpretation given to denial of justice, particularly by South American writers, can not be admitted. Certainly it means more than mere refusal of access to the courts; for, as will be seen, these courts must give an honest and regular decision in the case.⁴⁴ Furthermore, it is clear that justice, as dealt out by the courts, may be defective because of con-

⁴¹ Moore, *Arbitrations*, p. 4895, translation in Ralston, *Law and Procedure*, pp. 85-86.

⁴² Mr. Olney to Mr. Hamlin, July 16, 1896, Moore, *Digest*, VI, p. 272.

⁴³ In *Proc. Am. Soc.*, IV, p. 128; and refer to note 37, p. 112, *supra*. "The State, to which the foreigner belongs, may interfere for his protection when he has received positive maltreatment, or when he has been denied ordinary justice in the foreign country;" and in the latter case he must have exhausted the means of redress afforded by the local tribunals, Phillimore, *Commentaries*, II, pp. 3-5. See Vattel, I, Ch. XVIII, 350; Twiss and others quoted in Mr. Bayard to Mr. McLane, June 23, 1886, Moore, *Digest*, VI, p. 266; Borchard, *Diplomatic Protection*, p. 330, who speaks of the "narrower and more customary sense."

⁴⁴ See quotations from the Law of Salvador, and from M. Guerrero, for the Committee for Progressive Codification, in note 33, p. 111, *supra*. "For this reason our law relating to foreigners declares that there is no denial of justice except when the

siderations extraneous to the judicial system. "Justice," says Mr. Ralston, "may as well be denied by administrative authority as by judicial"; and it often occurs that an arbitrary executive action renders the court powerless.⁴⁵ Or again, to quote the well-known words of Secretary Fish:

Justice may as much be denied when, as in this case, it would be absurd to seek it by judicial process, as if it were denied after having been so sought.⁴⁶

It is obvious that, in the usual process of judicial protection for the alien, both the legislature and the executive must play an essential and inseparable part. A failure on the part of the legislature to give the necessary jurisdiction may render the court impotent to give redress; and the executive may arbitrarily prevent the court from giving justice, or fail to execute its decree. Or, as is well illustrated in the *R. E. Brown Case*, all three departments of government may combine to prevent judicial protection being given:

All three branches of the government conspired to ruin his enterprise. The Executive department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognised in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions. And, in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the State itself.⁴⁷

tribunals voluntarily retard the decision of matters submitted to their cognizance, or refuse absolutely to decide upon them," Argument of Señor Delgado, March 28, 1887, Moore, *Digest*, VI, p. 269.

⁴⁵ In the *Poggioli Case*, Ralston, *Venezuelan Arbitrations*, p. 869; and see his *Law and Procedure*, p. 86. Examples are: *Cheek Case*, Moore, *Arbitrations*, p. 1899, Moore, *Digest*, VI, p. 656; *Danford, Knowlton and Co.*, *ibid.*, p. 3149; *Johnson Case*, *ibid.*, p. 1656; *Montano Case*, *ibid.*, p. 1634; *El Triunfo Case*, *For. Rel.*, 1902, p. 870; "the President acting in his judicial capacity," *Case of Teodoro Garcia and M. A. Garza*, General Claims Commission, U. S. and Mexico, Docket No. 292, December 3, 1926, § 8.

⁴⁶ Mr. Fish to Mr. Foster, December 16, 1873, Moore, *Digest*, VI, p. 265.

⁴⁷ Nielsen's *Report*, p. 198; and see also his citations on p. 250. Other cases are: *Cotesworth and Powell*, Moore, *Arbitrations*, p. 2081; *Ballistini*, Ralston, *Venezuelan*

In every case, however, denial of justice results from the inability of the courts to give to the alien the redress which, because of its exclusive territorial jurisdiction, the state is obligated to furnish him.

The expansion of the principle of responsibility probably accounts for the attempts to widen the definition of denial of justice. In many of the citations above given, the statement is encountered that the state may not interpose in behalf of its national abroad unless that national has suffered a denial of justice.⁴⁸ There are, however, exceptions to this general statement of the rule; and in order to account for these exceptions, it is necessary either to expand the definition of denial of justice to include them, or else to admit that diplomatic interposition is justifiable for international illegalities other than denial of justice. The latter solution is preferable, not only because it permits of a reasonable, rather than a strained, interpretation being given to the words 'denial of justice,' but also because it aids in distinguishing between various types of international delinquencies and allows room for the further expansion of responsibility in practice. It remains nevertheless true that diplomatic interposition upon other grounds than denial of justice should be exceptional. As states build up their machinery for the local redress of injuries suffered by aliens to the international standard, these exceptions should become fewer and fewer. It must be remembered, however, that responsibility exists from the moment an internationally illegal act is committed, whether or not local remedies are called upon, and whether or not diplomatic interposition is permissible.

A denial of justice, then, is a failure in the administration of domestic justice toward an alien—the failure to give to the alien the same redress as is available to the citizen, where such redress is in order for the alien. Such a failure may appear in any one of a great number of situations.

§ 35. If an alien desires to institute judicial proceedings for

Arbitrations, p. 503; *Danford, Knowlton Co.*, Moore, *Arbitrations*, p. 3148; and see note 45, *supra*.

⁴⁸ "A claimant must exhaust his remedy before the local tribunals, when there are such, and when he is admitted to equal privileges in them, before he can claim diplomatic intervention," Mr. Davis to Mr. Taylor, October 20, 1871, Moore, *Digest*, VI, p. 661. A number of other such instances will be found in *ibid.*, §§ 913, 987. Mr. Moore heads § 987 "Local Remedies Must, as a Rule, be Exhausted"; and in following Sections states exceptions.

the redress of damages done to him, he must be allowed access to the courts upon the same terms as are allowed to citizens. If obstructions are put in his path, or if there is undue delay, there is room for the claim that the state has failed in this duty.⁴⁹ If the alien has been criminally attacked, the state must pursue his assailants and must itself institute proceedings against them;⁵⁰ and it is important that, if an alien is accused of crime, he should be given every opportunity to defend himself in court.⁵¹ His own state will usually watch with much interest to see that he has a fair trial.

Many opportunities for the perversion of justice appear during the actual course of the trial. If the court is under the arbitrary control of other agencies of the government, it will obviously be unable to render justice.⁵² The judge may exceed his jurisdiction,

⁴⁹ "Obstruction by Spanish officials of a citizen of the United States in Spain in his attempts to obtain judicial redress for injuries there inflicted on him is the subject of international complaint," Mr. Evarts to Mr. Fairchild, January 17, 1881, Moore, *Digest*, VI, p. 656. See also Mr. Bayard to Mr. McLane, June 23, 1886, *ibid.*, VI, p. 266; Mr. Marcy to Mr. Clay, May 24, 1855, *ibid.*, VI, p. 659; Mr. Bayard to Mr. Jackson, September 7, 1886, *ibid.*, VI, p. 680; *Ballistini Case*, Ralston, *Venezuelan Arbitrations*, p. 504; *Tagliaferro Case*, *ibid.*, p. 765; *Bovallins and Hedlund Case*, *ibid.*, p. 953; *Garrison's Case*, Moore, *Arbitrations*, p. 3129; *Richards Case*, General Claims Commission, U. S. and Mexico, Docket No. 22; *Turner Case*, *ibid.*, No. 1327; *de Galvan*, *ibid.*, No. 752.

"Undue and needless delay in the trial of a citizen abroad is ground for international intervention," Mr. Frelinghuysen to Mr. Morgan, March 5, 1884, Moore, *Digest*, VI, p. 277. See Hyde, *International Law*, I, p. 497; Borchard, *Diplomatic Protection*, p. 337; *Case of the Bark Jones*, Moore, *Arbitrations*, p. 3051; Decenièrre-Ferrandière, *Responsabilité*, p. 108, who mentions treaty provisions in this regard.

⁵⁰ "Considering that if the opinion of the agent of Venezuela that the perpetrators of the violence were wrongdoers and sharpers be accepted, it would follow that the obligation of prosecuting and punishing the criminals rested on the competent local authorities, without its being necessary that any request be made by the injured parties for that purpose," *Bovallins and Hedlund Case*, Ralston, *Venezuelan Arbitrations*, p. 952; and see similarly Mr. Evarts to Mr. Fairchild, January 17, 1881, Moore, *Digest*, VI, p. 656; *Glenn's Case*, Moore, *Arbitrations*, p. 3138; *Mills Case*, *ibid.*, p. 3034; *de Brissot Case*, *ibid.*, p. 2968; *Piedras Negras Claims*, *ibid.*, p. 3036; *Davy Case*, Ralston, *Venezuelan Arbitrations*, p. 411; *Poggioli Case*, *ibid.*, p. 847; *Kennedy Case*, General Claims Commission, U. S. and Mexico, Docket No. 7; *Richards Case*, *ibid.*, No. 22; *Neer Case*, *ibid.*, No. 136; *Diaz Case*, *ibid.*, No. 293; *Massey Case*, *ibid.*, No. 352; Hyde, *International Law*, I, § 268.

⁵¹ "The refusal of a Chilean court, in 1852, on the trial for crime of an American citizen, to hear testimony on behalf of the defendant, would, if sustained by the Chilean government, be considered by the United States as a 'gross outrage to an American citizen, for which it will assuredly hold Chile responsible,'" Mr. Conrad to Mr. Peyton, October 12, 1852, Moore, *Digest*, VI, pp. 274-275. Note also Mr. Frelinghuysen to Mr. Lowell, April 25, 1882, *ibid.*, VI, p. 276; Mr. Bayard to Mr. West, June 1, 1885, *ibid.*, VI, p. 279; *Sartori Case*, Moore, *Arbitrations*, p. 3123; *Driggs Case*, *ibid.*, p. 3125; *Moliere Case*, *ibid.*, p. 3252; Hyde, *International Law*, I, § 269; Borchard, *Diplomatic Protection*, pp. 99, 357.

⁵² See the *Robert E. Brown Claim*, quoted on p. 117, *supra*; the *Idler Case*, Moore,

or be guilty of fraudulent or collusive practice.⁵³ The case must be conducted with regard to due process of law; but the process meant is that of the country in which the trial occurs.⁵⁴ The alien is entitled to the same measures for his own judicial protection as the national may claim, including such matters as the right to summon witnesses and to appeal; and he must not be discriminated against on the ground of his alienage.⁵⁵ The difficult problem of a manifestly unjust decision has been the subject of a previous discussion; but it may be repeated in this connection that mere error on the part of a court, unless it be attended by fraud, does not constitute denial of justice.⁵⁶ A flagrant miscarriage of justice is, as

Arbitrations, p. 3317; Mr. Cass to Mr. Dimitry, May 3, 1860, Wharton, *Digest*, II, p. 615; *Salvador Commercial Co. Case*, *For. Rel.*, 1902, p. 862.

⁵³ "A fraudulent decision by a foreign judge condemning an American ship is a ground for a demand for redress by this Government from the Government of such judge," Mr. Seward to Mr. Webb, December 7, 1867, Wharton, *Digest*, II, p. 615. See *Case of the Caroline*, Moore, *Digest*, VI, p. 748. "A collusive or irregular judgment by a foreign court is no bar to diplomatic proceedings by the sovereign of the plaintiff against the sovereign of the court rendering judgment," Mr. Evarts to Mr. Foster, April 19, 1879, *ibid.*, VI, p. 696.

The most famous example of a court exceeding its jurisdiction is the *Costa Rica Packet Case*. This, however, must be regarded as a violation of international law other than denial of justice. See *Jonan's Case*, Moore, *Arbitrations*, p. 3251; *Hall's Case*, *ibid.*, p. 3303; Mr. Marcy to Chevalier Bertinatti, December 1, 1856, Moore, *Digest*, VI, p. 748.

⁵⁴ "But we have claimed that by international law and by the customs and usages of civilized nations, a trial at law must be conducted without unseemly haste, with certain safeguards for the accused, and in deference to certain recognized rights, in order to mete out justice," Mr. Fish to Mr. Cushing, December 27, 1875, Wharton, *Digest*, II, p. 620. See Mr. Evarts to Mr. Langston, April 12, 1878, Moore, *Digest*, VI, p. 656; *Montano Case*, Moore, *Arbitrations*, p. 1634; *Garrison's Case*, *ibid.*, p. 3129; *van Bokkelen's Case*, *ibid.*, p. 1842; *Idler Case*, *ibid.*, p. 3508; *Neptune Case*, *ibid.*, p. 3076; *Bullis Case*, Ralston, *Venezuelan Arbitrations*, p. 170.

That the procedure of the state in question must be accepted (provided it measures up to the international standard), Hyde, *International Law*, I, § 219; Borchard, *Diplomatic Protection*, p. 198. Much variation in practice is thus permitted. As to what the United States considers due process, see Mr. Evarts to Aristarchi Bey, December 8, 1877, Wharton, *Digest*, II, p. 625, and elsewhere in § 230; and the *Bullis Case*, cited in this note.

⁵⁵ "Discrimination against an American citizen on the ground of alienage by which he is excluded from redress in courts of justice for injuries inflicted on him, is a ground for diplomatic interposition," Mr. Porter to Mr. Phelps, June 4, 1885, Moore, *Digest*, VI, p. 253; and see generally, *ibid.*, § 992. Also, Hyde, *International Law*, I, § 285; Borchard, *Diplomatic Protection*, pp. 333, 339, note 7; Resolutions of the Institut, 1927, Article 6, Appendix III, *infra*.

⁵⁶ "Where the judges are left free, and give evidence according to their conscience, though it should be erroneous, there is no ground for reprisals," *Zamora Case*, Grant, *Prize Cases*, III, p. 14. See the doctrinal notes in Lapradelle-Politis, *Recueil*, II, pp. 33, 112; Ralston, *Law and Procedure*, p. 91; Committee for Progressive Codification, *Responsabilité*, p. 9; Decencière-Ferrandière, *Responsabilité*, pp. 111-112.

has been seen, itself productive of responsibility; but a diplomatic claim is not in order in such cases until local remedies prove lacking or unavailable.⁵⁷ It is a recognized and praiseworthy practice among states to give full credit to the judicial action of other states. It should be observed that it is the duty of the alien to carry his case to the highest court, and thus to allow to the state every opportunity to redress its own mistakes.⁵⁸

Denial of justice is still possible after the decree of the court has been rendered. The duty of executing the decree lies with the administrative authorities; and a failure on their part to enforce the decision of the judge is as truly a denial of justice as miscarriage in the courtroom. If civil redress granted by the courts is not enforced by the proper authorities, or if criminal penalties are not levied against those who attack aliens, the responsibility of the state may still be called into play.⁵⁹

§ 36. The protection of the alien represents a constant interplay between two forces: the exclusive control which the state exercises, as an incident of its independence, over all persons within its territories; and the desire of each state, equally recognized by international law, and backed by the need of intercourse between interdependent states, to assure fair treatment of its nationals wherever they go. An evident purpose exists, justified for reasons above given, to leave to the state within which the alien is located as great a degree of control over him as is consistent with universal ideas of justice; and the problem is one of finding a sliding rule which will cover all cases. It has been said that the function of the state is to prepare the way for its own demise, by so educating its members to respect the rights of others that state control over individuals

⁵⁷ See § 22, notes 94 and 95, *supra*, and the discussion of the *Chattin Case*, § 34, *supra*.

⁵⁸ *Driggs Case*, Moore, *Arbitrations*, p. 3160; *De Caro Case*, Ralston, *Venezuelan Arbitrations*, p. 819; Mr. Clay to Mr. Tacon, February 5, 1828, Moore, *Digest*, VI, p. 652.

⁵⁹ *Montano Case*, Moore, *Arbitrations*, p. 1634; *Renton Case*, Moore, *Digest*, VI, pp. 794-799. A pardon may have the same effect, Borchard, *Diplomatic Protection*, p. 218; *West Case*, General Claims Commission, U. S. and Mexico, Docket No. 241. "Punishment without execution of the penalty constitutes a basis for assuming a denial of justice," *Mallén Case*, General Claims Commission, U. S. and Mexico, Docket No. 2935, April 27, 1927, § 11; *Putnam Case*, *ibid.*, No. 354; *Youmans Case*, *ibid.*, No. 271. The Commission also considered the escape of a prisoner to establish a denial of justice, *Putnam Case*, *ibid.*, Docket No. 354, April 15, 1927, § 6; *Massey Case*, *ibid.*, Docket No. 352, April 15, 1927, § 25.

will no longer be necessary. Similarly, it may be said that the sole purpose of the supervision exercised by the community of nations over the treatment of aliens by one of its members is to maintain a certain standard of justice for individuals wherever they may be; and the more satisfactory the administration of justice within a state, the less opportunity will there be for intervention from the outside. But, just as no state has thus far attained so ideal a position as to justify abandoning its control over its members, so it can not be presumed that states have provided and will maintain such excellent systems of justice as to render international supervision unnecessary. While in all states local remedies must be respected so far as possible, and while in the better organized states there is rarely occasion for interference with the usual course of justice, it is still necessary that there should be an opportunity for diplomatic interposition in behalf of citizens abroad; and it will perhaps be helpful at this point to sum up the occasions upon which such action may be taken.

It must be repeated that diplomatic interposition and state responsibility are not coterminous nor necessarily coincident. Responsibility may appear before interposition is permissible; and, of course, it does not follow from the fact that matters have been taken up for diplomatic consideration, that responsibility is thereby established. Any act on the part of the state which is internationally illegal brings responsibility; but for some such acts the injured states may seek reparation through local channels while for others it is permitted to make a diplomatic claim. Responsibility is a matter of principle; interposition is a question of procedure. Responsibility exists from the moment the state violates international law to the detriment of another state or its member; and whether the latter state shall be satisfied with local redress or shall undertake diplomatic interposition is another problem, the answer to which has been attempted in this chapter. But the rule that local remedies must be exhausted before diplomatic interposition is permissible is of more than mere procedural value; for it is the legal recognition of the exclusive jurisdiction of states within their own territories.

The cases in which an aggrieved state is allowed to resort to diplomatic procedure have been developed in the preceding chapters, and require only summary restatement here. Usually where the

state itself, and occasionally where an individual within it, does injury to another state under international law, a complaint will be made directly by the injured state to the respondent state. For the violation of the territorial jurisdiction of a neighboring state, for example, no local redress would be available. Where an injury is done to an alien, whether by the state of his residence, or by an individual therein, local remedies are frequently provided. Such opportunities for redress must be employed and accepted unless (1) they do not measure up to the international standard; or (2) a denial of justice has been established. Finally, if the injury has been done by an individual, the state is responsible and local remedies need not necessarily be sought, if it is established that the state has not exercised due diligence in its duties of prevention.

It is a common mistake, oftentimes indicative merely of careless phraseology, but explicitly asserted by some writers, to speak of international responsibility as appearing only when diplomatic discussions are begun. Such a statement is true only in a procedural sense. Diplomatic interposition is not even the chief process employed in obtaining reparation for injurious acts; for many injuries to aliens are redressed by the ordinary domestic action of the state of the alien's residence, without either foreign office being aware of the existence of a potential source of a diplomatic claim. It should be regarded as an extraordinary remedy, and be correspondingly restricted in use.⁶⁰ Proper limitation upon its employment will result not only in increasing the respect due to the dignity and independence of states, and in relieving the burden upon international intercourse, but will diminish the complaints of small states, in which the right of interposition has often been abused by stronger powers. As a practical matter, however, the right of intervention will not, and can not, be surrendered by states so long as there is need for it in the protection of their interests abroad.

⁶⁰ "Diplomatic interposition may more properly be considered as an extraordinary legal remedy granted to the citizen, within the discretion of the state, under certain circumstances in harmony with the public interests of the state, its relations with other states, and the rights and equities of the citizen," Borchard, *Diplomatic Protection*, p. 353. "A foreigner, before he applies for extraordinary interposition should use his best endeavors to obtain the justice he claims from the ordinary tribunals of the country," Mr. Jefferson to the British Minister, April 18, 1793, Moore, *Digest*, VI, p. 259. "La voie diplomatique n'est, évidemment, qu'une ressource extreme, mais à laquelle on peut avoir a recourir," *R. D. I. P.*, II, p. 34; Lapradelle-Politis, *Recueil*, II, p. 710, note 3; Article 12, Resolutions of the *Institut*, 1927, Appendix III, *infra*.

To the extent that states provide themselves with adequate and efficiently working judicial machinery for the protection of foreign interests, the need for international action will be diminished, and respect for the control of the state within its territories will be assured.

CHAPTER VI

MOBS AND CIVIL WARS

§ 37. No portion of the subject of state responsibility is more controversial, and none more confused in practice, than the question of whether a state may be held to account for damages occurring during periods of great civil disturbance. Because of the stress put upon the resources of the state in times of such emergency, it has sometimes been argued that these cases constitute an especial category, resulting from a *force majeure*. The assumption is that there are certain forces beyond the power of the state to control, and that, if injuries result from the operation of these forces, the state can not reasonably be compelled to make reparation for them. It would doubtless be admitted that a government would not be held to repair the losses suffered by aliens from earthquake, fire, flood, plague, and other forces of nature.¹ *Ad impossibile nemo tenetur*.

Among such forces, beyond ordinary control, it is argued that mob action and civil war belong. In either case, mass action, inspired by elemental human passions, becomes a great tidal wave of force, sweeping away the ordinary barriers set up for the protection of individuals, and rendering impossible the successful operation of the usual agencies of the state, or even its maximum endeavors. The debate over the state's responsibility for injuries suffered under such conditions has produced many theories as to the relation between the state and the alien; and the greatest disparity, both in opinion and in cases, will be found to exist. It is believed, however, that there is no necessity calling for the establishment of an especial category of cases involving a so-called *vis major*. It will be found that the guiding formulae are still those which have been postulated in the foregoing discussion, and that these rules are of sufficient elasticity to cover the cases now to be considered. To say

¹ Though it may be suggested that human ingenuity has so well provided against such damages, through preventive measures, or insurance, that a state might conceivably be held, in the future, to responsibility for insufficient protection against floods (e.g., careless maintenance of dikes), or fire, or plague. Such provisions are already to be found in municipal laws, as, e.g., factory and sanitation laws.

that an injury occurred as the result of mob action or of civil war is not enough, of itself, to eliminate or fix responsibility. Responsibility may or may not exist; and its existence is to be determined by the same rules of due diligence and local redress, applied by an administrative system measuring up to the international standard, as determine the responsibility of the state in other cases of damages done by individuals.

§ 38. While the assertion is sometimes met with, that, because of their exceptional nature, no liability attaches to the actions of mobs,² governments no more hesitate in practice to base claims upon injuries arising from mob action than from other acts of individuals. Indeed, they have been more apt to intervene in mob cases. Such lawless conduct outrages the public conscience everywhere; and successful claims have been made, and indemnity paid, in innumerable cases. In some of these no argument was advanced beyond the mere fact that the damage was caused by a mob within the territorial control of the respondent state, indemnity being forthwith paid.³ Not many cases of mob violence have been presented to arbitral tribunals; but, in the few which are recorded, the possibility of responsibility has been recognized, and in some cases indemnity awarded.⁴ The United States has consistently pre-

² In the discussion between France and Spain concerning the *Saïda* affair, France argued: "Ces mesures de réparation ne sauraient pas, évidemment, dans l'espèce, procéder d'une obligation juridique. Les événements de Saïda rentrent dans la catégorie des faits inevitables auxquels tous les habitants de la contrée sont exposés, comme atteinte d'un fleau, et qui ne peuvent engager la responsabilité de l'État," *Archives Diplomatiques*, 2nd Ser., VII (1882-3), p. 57. France has not, however, hesitated to present claims against other states, e.g., the *Mannheim Case*, *Clunet*, 49, p. 1243; or murders in China, *Br. and For. St. Pap.*, 51, p. 651.

³ In the *Fortune Bay Case*, England did not discuss liability for mob action, but merely the rights of fishermen under the treaty, *Br. and For. St. Pap.*, 72, p. 1265. For the sacking of an American Baptist Church in Peru, that government paid an indemnity with no question whatever, *For. Rel.*, 1901, p. 28. See also *Lienchou Riots*, *For. Rel.*, 1906, I, p. 308; *Case of Wm. Wright*, *ibid.*, 1909, p. 348; murder of French in Japan, *Arch. Dip.*, 34 (Tome deuxième, 1869), p. 601; *Frets' Case*, Moore, *Arbitrations*, p. 2560. In the *Aigues-Mortes Case*, while there may have been doubt as to the legal liability, there seems to have been no question that indemnity would be paid, *R. D. I. P.*, I, p. 171. See Garner, in *Proc. Am. Soc.*, 1927, p. 58.

⁴ *Donoughho Case*, Moore, *Arbitrations*, p. 3014; *Jeannotat's Case*, *ibid.*, p. 3674; *Panama Riots*, *ibid.*, p. 1361; *van Bokkelen Case*, *ibid.*, p. 1815; *Jennie L. Underhill Case*, Ralston, *Venezuelan Arbitrations*, p. 50; *Ruden et Cie.*, *Lapradelle-Politis*, *Recueil*, II, p. 588; *R. T. Johnson*, *ibid.*, p. 593.

In the *Lagueruene Case*, the award rejected responsibility; but it left the way open for responsibility for a denial of justice, Moore, *Arbitrations*, p. 3028. In the *Derbec Case*, responsibility was denied on the ground that "the acts were committed by a mob in riot, and not by the authorities of the United States," *ibid.*, p. 3031.

sented claims to other states, and, as will be seen, has often paid indemnity herself, though upon one occasion only recognizing a legal obligation to do so.

While, as has been said, damages have at times been paid without question, usually the argument concerning the responsibility of the state for damages due to mob violence follows the same lines of argument as for state responsibility in other cases. An exception is sometimes made for xenophobic manifestations, which, as against aliens as such or against nationals of one particular state, or perhaps as exhibitions of religious antagonism, are assimilated to attacks against the state itself, injurious to its self-respect, and therefore calling for instant interposition. It is doubtful whether such a rule may be positively asserted, of itself engaging a responsibility on the part of the state, and independent of other contributory elements. At any rate, it may be said that such a manifestation furnishes a *praesumptio iuris* that aliens are not receiving the same treatment as nationals.⁵

Ordinarily, mob injuries must be judged by the same rules as acts of individuals. If a state uses the means at its disposal in a diligent manner for the prevention of injuries, and properly enforces its measures of redress, it can no more be held to responsibility for the acts of a mob than for those of single individuals.⁶ This was fundamentally the position taken by Lord Palmerston in the famous *Don Pacifico Case*:

⁵ "Mob injuries to aliens are almost always a distinct injury to the state itself," Goebel, in *A. J.*, VIII, p. 812. "The fact is enough that a number of aliens has been injured," Bar, *loc. cit.*, p. 471; also pp. 237, 473. Borchard, *Diplomatic Protection*, p. 221; de Visscher, *Responsabilité*, p. 104; Garner, in *Proc. Am. Soc.*, 1927, p. 57; editorial comment on *Aigues-Mortes Case*, in *R. D. I. P.*, I, p. 75; *Réglement de l'Institut de Droit International*, translated in Ralston, *Venezuelan Arbitrations*, p. 733; *Salonica Riot*, *Br. and For. St. Pap.*, 67, p. 917; case at Mollendo, Peru, *For. Rel.*, 1893, p. 509; Mr. Evarts to Chen Lan Ping, December 30, 1880, Moore, *Digest*, VI, p. 820. *Clunet*, 1891, p. 1147, discusses the anti-racial character of the riot at New Orleans in 1891, but Governor Nichols denied any such element, *For. Rel.*, 1891, p. 658.

⁶ "The government is liable, however, where it fails to show due diligence in preventing or suppressing the riot, or where the circumstances indicate an insufficiency of protective measures or a complicity of government officers or agents in the disorder," Borchard, *Diplomatic Protection*, p. 224. "It is therefore held that if due diligence is used to prevent and repress sudden outbreaks, and to punish those who may be concerned in them, no liability to make indemnity exists . . .," Moore, "The Responsibility of Governments for Mob Violence," *Columbia Law Times*, V, p. 212. See Hyde, *International Law*, I, § 290; editorial comment, *Aigues-Mortes Case*, *R. D. I. P.*, I, p. 175; Garner, in *Proc. Am. Soc.*, 1927, p. 62; Coffey, *ibid.*, pp. 63-64.

The Greek Government having neglected to give the protection they were bound to extend, and having abstained from taking means to afford redress, this was a case in which we were justified in calling on the Greek Government for compensation for the losses, whatever they might be, which M. Pacifico had suffered.⁷

The United States has often based her claims against other states, due to mob violence, upon neglect to furnish the requisite protection. As a fair example of her position, the words addressed to Turkey in 1897 may be quoted:

A government being able to quell and not quelling such disorders, and damage to American property having resulted, the United States contends that Turkey can be held responsible under a well-recognized principle of international law.⁸

On the other hand, she has defended herself against claims addressed to her, on the ground that no lack of due diligence was evident on her part; and she has refused to prosecute the claims of her citizens against other states for the same reason.⁹ Arbitral tribunals

⁷ Speech of June 25, 1900 (*sic*), Moore, *Digest*, VI, p. 853.

⁸ Mr. Sherman to Mr. Angell, August 23, 1897, Moore, *Digest*, VI, p. 867. "It is the duty of Brazil when she receives the citizens of a friendly state to protect the property which they carry with them or may acquire there. If persons in the service of that government connive at or instigate a riot, for the purpose of depriving a citizen of the United States of his property, the Imperial Government must be held accountable therefor," Mr. Fish to Mr. Partridge, March 5, 1875, *ibid.*, p. 816. See also Mr. Evarts to Mr. Gibbs, May 28, 1878, *ibid.*, VI, p. 818; Mr. Blaine to Mr. Egan, January 21, 1892, *ibid.*, VI, p. 857; Mr. Olney to Mr. Terrell, October 17, 1896, *ibid.*, VI, p. 866; *Panama Riots* of 1912, *For. Rel.*, 1915, p. 1162, and 1916, p. 918; *Riot at Colon*, *ibid.*, 1916, p. 924.

"The United States has frequently interposed in behalf of American victims of mob violence in foreign states. In so doing it has correctly asserted that when any agency of a territorial sovereign either wantonly or passively fails to use the means at its disposal to prevent violence or to prosecute the perpetrators, a denial of justice is apparent, and national responsibility therefor established, irrespective of the relationship of such sovereign to the delinquent local authorities," Hyde, *International Law*, I, p. 522.

⁹ "There is no government, however civilized it may be, however great may be the vigilance displayed by its police, however severe its criminal code may be, and however speedy and inflexible may be its administration of justice, that can guaranty its own citizens against violence growing out of individual malice or a sudden popular tumult," the Secretary of State (Blaine) to the Marquis Imperiali, May 21, 1891, quoted in Mr. Pereira to Mr. Egan, January 25, 1892, Moore, *Digest*, VI, p. 861. "As a result, it appears that all the normal precautions for the safety of the prisoners had been taken by the local officers, and that no blame can justly attach to them by reason of the sudden outbreak of mob violence against these three men against whom there lay convincing evidence of the murder of two estimable citizens of the neighborhood," Report of Mr. Olney to the President, December 7, 1896, *ibid.*, VI, p. 844.

have asserted the rule of diligence as an important element in the formation of their decisions.¹⁰ Of course, where connivance or participation on the part of the authorities of the state is established, responsibility follows at once; and if warning has been given to the officials of the impending danger, the evidence of governmental negligence is greater.¹¹ The primary criterion for responsibility in mob cases seems to be clearly established as the exercise of a proper care in the prevention of such injuries, responsibility being established by negligence in this duty; and it is unfortunately true, from the very nature of the proceedings, that negligence is usually, and connivance only too frequently, proved against officials of the state.

But if there has been no question as to the proper performance by the state of its duties of prevention, it is still possible—and, indeed, deplorably probable—that its responsibility may nevertheless be fixed through other acts or omissions constituting a denial of justice; for the rule of local redress applies co-ordinately with that of due diligence. The primary duty is prevention; but the state has also the subsequent duty of repairing the damage done, through its own agencies.¹² The use of its own courts is not only its duty:

See also Mr. Rives to Count Sebastiani, June 19, 1831, *ibid.*, VI, p. 810; Mr. Webster to Mr. Calderon de la Barca, November 13, 1851, *ibid.*, VI, p. 814; Mr. Frelinghuysen to Mr. Kuki Rinichi, October 20, 1884, *ibid.*, p. 819; Mr. Evarts to Chen Lan Ping, December 30, 1880, *ibid.*, VI, p. 821; case at Erwin, Miss., *ibid.*, VI, p. 848; *Bain's Case*, *ibid.*, VI, p. 850; Hyde, *International Law*, I, p. 520, and especially note 4.

¹⁰ Refer to cases cited in note 4, p. 126, *supra*; and see the *Gelbrunk Case*, *For. Rel.*, 1902, p. 879.

¹¹ See *Case of Jencken*, in Spain, 1870, *Br. and For. St. Pap.*, 62, pp. 990, 999; *Lienchou Riots*, *For. Rel.*, 1906, I, p. 312; riot at Mollendo, Peru, in which the police were instructed, *For. Rel.*, 1893, p. 509; assault on members of crew of U. S. S. *Baltimore* at Panama, *ibid.*, 1909, p. 475; *Cases of Ruden* and *R. T. Johnson*, *La-pradelle-Politis*, *Recueil*, II, pp. 588, 593; Mr. Fish to Mr. Partridge, quoted in note 8, p. 128, *supra*; Mr. Evarts to Mr. Gibbs, May 28, 1878, *Moore, Digest*, VI, p. 817; *Bain's Case*, *ibid.*, VI, pp. 849-850; President Cleveland, annual message, *ibid.*, VI, p. 865; *Youmans Case*, General Claims Commission, U. S. and Mexico, Docket No. 271, November 23, 1926; *Jeannotat's Case*, *Moore, Arbitrations*, p. 3674; Hyde, *International Law*, I, p. 517; Borchard, *Diplomatic Protection*, pp. 224, 225.

In the New Orleans Riot of 1851, placards had been posted in the morning threatening an attack for the afternoon, *Moore, Digest*, VI, p. 811. In *Bain's Case* the British Ambassador "stated that some months prior to the event in question foreign ships and property were exposed to great danger owing to the lawless proceedings of certain societies," *ibid.*, VI, p. 849. See Mr. Blaine's statement in the 1891 case at New Orleans, *ibid.*, VI, p. 839.

¹² Mr. Evarts to Chen Lan Pin, December 30, 1880, *Moore, Digest*, VI, p. 822; Mr. Blaine to the Marquis Imperiali, April 14, 1891, *ibid.*, VI, p. 839; case at Erwin, Miss., 1901, *ibid.*, VI, p. 848; *Bain's Case*, *ibid.*, VI, pp. 849-850; Mr. Hay to Baron Riedl von Riedenau, February 4, 1899, *ibid.*, VI, p. 879; Huffcutt, in *Annals*

it is the right of the state. Respondent states have often demanded that local remedies be pursued, and have rejected diplomatic interposition or any consideration of indemnity until such remedies have failed.¹³ Unfortunately, they usually do fail. Mob action reflects a strongly excited public opinion, which has a deterrent effect upon witnesses, juries, and even judges and other officials of the state. The result is apt to be, as it was denominated in one case, a burlesque upon justice.¹⁴ So difficult is it to secure a proper administration of justice in the localities where mob action has occurred, that a tendency is found to hold liable local units for damages due to mob violence therein. Statutory provision for pecuniary compensation in such cases is made in a number of states.¹⁵ Of course, if local remedies fail, and a denial of justice is apparent, the state may again be held responsible, and diplomatic interposition is in order.¹⁶

As elsewhere, the performance of the state in respect to these duties is measured by an international standard. It is not enough

Am. Acad., II, p. 82; Borchard, *Diplomatic Protection*, p. 223; Hyde, *International Law*, I, § 290; editorial comment in *R. D. I. P.*, I, p. 175; Article 7 of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

¹³ "The provision of an organized and in some cases privileged forum excludes the idea of direct recourse by the alien to other means of obtaining justice or redress . . . just and ample opportunity is given to all who suffer wrong and seek reparation through the channels of justice as conducted by the judicial branch of our Government," Mr. Bayard to Mr. Cheng Tsao Ju, February 18, 1886, Moore, *Digest*, VI, pp. 832, 834. See Mr. Fish to Mr. Foster, February 23, 1875, *ibid.*, VI, p. 815; Mr. Evarts to Sir E. Thornton, May 24, 1880, *ibid.*, VI, p. 819.

¹⁴ Mr. Cheng Tsao Ju to Mr. Bayard, November 30, 1885, Moore, *Digest*, VI, p. 823, with regard to the Rock Springs, Wyoming, massacre, in which the coroner reported that the victims had come to their deaths from causes unknown. President Cleveland in his message of March 2, 1886, called it a "ghastly mockery of justice."

¹⁵ See Hyde, *International Law*, I, § 292; Borchard, *Diplomatic Protection*, pp. 141, 154, 158; Mr. Bayard to Mr. Cheng Tsao Ju, February 18, 1886, Moore, *Digest*, VI, pp. 831-832; *Derbec's Case*, Moore, *Arbitrations*, p. 3029.

¹⁶ "In summarizing the circumstances, the Chinese Minister emphasized the facts . . . (2) that, although it occurred in broad daylight, the civil authorities made no attempt to prevent or suppress the riot and afterwards held an inquest which had been described as a 'burlesque,' and (3) that, according to the reports of the consuls, none of the offenders was likely ever to be brought to punishment by the Territorial and local authorities," Mr. Cheng Tsao Ju to Mr. Bayard, November 30, 1885, Moore, *Digest*, VI, p. 823. Mr. Bayard, in reply, recommended indemnity, *ibid.*, VI, pp. 834-835. See Mr. Evarts to Mr. Gibbs, May 28, 1878, *ibid.*, VI, p. 817, *re* Wexel and de Gress; Erwin, Miss., case, *ibid.*, VI, pp. 848-849; *Cases of Moreno and Suaste*, *ibid.*, VI, p. 851; *Don Pacifico Case*, *ibid.*, VI, p. 853. A denial of justice was claimed in the Hahnville, La., case, of which Baron Fava remarked with sarcasm: "It is true that the grand jury met and waited for the criminals to come forward and accuse themselves." The United States, however, opposed the claim, *For. Rel.*, 1896, pp. 413, 410; Hyde, *International Law*, I, p. 520, note 4.

to say that the diligence required for the protection of citizens is sufficient for the alien; and that since citizens are also injured by mobs, without possibility of compensation, aliens have no claim to indemnity.¹⁷ As Mr. Lansing remarks:

Whatever political institution or political system a nation may possess for the government of its own domestic affairs, such institution or system must not interfere with its international duties. . . . The policy of national selfishness has become antiquated and must give place to those altruistic ideas which are consistent with the modern conception of international morality.¹⁸

Mr. Hyde points out that the processes which are adequate in the case of citizens "may notoriously fail when the complainant is an alien and local prejudice is aroused against him."¹⁹ It may be necessary, then, for the state to provide special remedies for aliens, though, as Mr. Hyde suggests, these need not be considered as discrimination in favor of the alien, but simply as giving him equal opportunity by different process. The claim that domestic legislation is the final measure of the responsibility of the state has often been denied in relation to mob injuries.²⁰

§ 39. The fact that in the United States lynchings and riots are recurrent to a degree exceptional among civilized states, produces an especial problem of international responsibility for her consideration. In addition to the inexplicable attitude of public opinion upon the subject, the problem is complicated by the constitutional organization of the nation. Consequently, the position which she has assumed toward other states in this regard has not always been free from inconsistency.²¹

On the one hand, the United States has made claims against

¹⁷ Mr. Evarts to Chen Lan Pin, December 30, 1880, Moore, *Digest*, VI, p. 822; Mr. Hay to Baron Riedl von Riedenau, February 4, 1899, *ibid.*, VI, p. 879.

¹⁸ In *Proc. Am. Soc.*, II (1908), p. 60.

¹⁹ Hyde, *International Law*, I, pp. 469-470; and see Watson, in *Yale Law Journal*, XXV, p. 561.

²⁰ See the reply of the Austrian chargé to Mr. Hay, April 28, 1899, Moore, *Digest*, VI, p. 881; statement of Senator Edmunds, quoted *ibid.*, VI, p. 835; Borchard, *Diplomatic Protection*, p. 226; Garner, in *Proc. Am. Soc.*, 1927, p. 62.

²¹ A quotation from Mr. Moore reveals the difficulty of a summary statement of the practice of the United States: "Such cases sometimes apparently present strong grounds of national liability because of the popular approval of the mob's action, and the consequent immunity of the actors from prosecution and punishment. The rule, however, which has generally been maintained in argument, even if not in practice, is

other states for injuries done to American citizens abroad through mob violence. These claims have not been presented in the form of requests for generous or equitable consideration, but have been demanded as a matter of legal right, and supported by extreme diplomatic measures, amounting to threats, where the occasion seemed to require such procedure.²² At times, she has appeared to assert such liability as arising from the fact alone that the injury had been done by a mob.²³ A study of the claims directed by the United States against other nations would, apparently, reveal her firm conviction that a state is legally responsible for damages suffered by aliens within its jurisdiction, due to mob action, if negligence or denial of justice were evident.

When, however, her arguments in reply to claims directed against herself are examined, a different viewpoint is revealed. Up until 1891, arguments of unconvincing nature were advanced by her in opposition to claims occasioned by riotous conduct within her territory. Thus, Mr. Webster, while admitting responsibility for injuries to the Spanish consul in the New Orleans Riot of 1851, claimed that Spanish subjects were entitled to no more protection than our own citizens; and the appropriation made by Congress for the latter was explained as a recognition of the magnanimity of the Queen of Spain in releasing certain Americans imprisoned in Cuba.²⁴ In spite of this denial of liability, the action of the United States in granting indemnity was cited to prove the legal responsibility of Peru in the case of Wexel and de Gress.²⁵ The claim of non-liability found an extreme illustration in the shocking affair at Rock Springs, Wyoming. On this occasion, a mob drove out all Chinese residents, in the process killing twenty-eight, wounding fifteen, and destroying property worth almost \$150,000. The

that while a government is bound to employ all reasonable means to prevent such disorders, it is not required to make indemnity for the losses that may result from them," except for special treaty provisions, Moore, *Digest*, VI, p. 809; and see Mr. Rives to Mr. Buck, *For. Rel.*, 1888, II, p. 1375.

²² See references in note 8, p. 128, *supra*; and also, examples given by the Chinese Minister of the practice of the United States towards China, Moore, *Digest*, VI, p. 825; Mr. Blaine to Mr. Egan, January 21, 1892, *ibid.*, VI, pp. 858-859; *Panama Riots*, *For. Rel.*, 1915, p. 1162.

²³ Borchard, *Diplomatic Protection*, p. 365; *Fortune Bay Case*, *Br. and For. St. Pap.*, 72, p. 1265; *Fretz' Case*, Moore, *Arbitrations*, p. 2560.

²⁴ Mr. Webster to Mr. Calderon de la Barca, November 13, 1851, Moore, *Digest*, VI, pp. 812-814; and see the *McCord Claim*, *For. Rel.*, 1888, II, p. 1375.

²⁵ Mr. Evarts to Mr. Gibbs, May 28, 1878, Moore, *Digest*, VI, p. 818.

coroner returned a verdict of death from causes unknown. The Chinese Minister, in a strong note, pointed out that in similar cases in China the United States had demanded reparation, even for such trivial things as the sum of \$73 stolen from an American, and had dispatched gunboats to enforce such claims. Secretary Bayard attempted, in many pages, the hopeless task of refuting the Chinese argument, and emphatically denied "all liability to indemnify individuals." Again Congress made an appropriation sufficient to cover the damage.²⁶ The details of this case leave no doubt whatever of the legal liability of the United States.²⁷

Such an inconsistent attitude on the part of a great civilized state could not continue for long. When several Italians were lynched at New Orleans, in 1891, Secretary Blaine again denied liability, as a result of which, after a sharp correspondence, the Italian minister was withdrawn. Ultimately, Congress voted an appropriation of 125,000 francs, which sum was turned over to Italy with the observation that the President feels "that it is the solemn duty, as well as the great pleasure, of the National Government to pay a satisfactory indemnity."²⁸ While the United States has never since that time denied the existence of a legal responsibility, when such was found in fact to exist, it has never again formally acknowledged its own responsibility in any particular case. Congress has upon some occasions paid damages, and has referred to them as 'indemnity'; but appropriations are accompanied by the phrase "without reference to the question of liability."²⁹ It is difficult to

²⁶ Mr. Cheng Tsao Ju to Mr. Bayard, November 30, 1885, *ibid.*, VI, pp. 822-826; Mr. Bayard to Mr. Cheng Tsao Ju, February 18, 1886, *ibid.*, VI, pp. 826-835. Art. V of the immigration treaty between the United States and China of March 12, 1888, stipulated for the payment of \$276,619.75 as full indemnity for losses suffered by Chinese in the United States but declared that the payment was made "without reference to the question of liability (which as a legal obligation it [the United States] denies)," *ibid.*, VI, p. 836. The sum was finally paid "out of humane consideration and without reference to the question of liability therefor." *Ibid.*; on the following page, the United States, with regard to a similar payment from China, expresses "satisfaction that so just a demand has been so frankly and promptly met." On the practice of the United States concerning mob cases in China, see McNair, in *Chinese Social and Political Science Review*, VIII, pp. 48-86.

²⁷ According to Mr. Lansing, Secretary Bayard denied liability "while thus admitting facts which constituted grounds for a claim as strong as can be found in the annals of international intercourse," *Proc. Am. Soc.*, II, p. 54. See also Huffcutt, in *Annals Am. Acad.*, II, p. 82.

²⁸ Moore, *Digest*, VI, pp. 837-841. "Here is no reservation as to the Government's obligation, but an unequivocal admission of liability," Lansing, in *Proc. Am. Soc.*, II, p. 57.

²⁹ For the Walsenburg, Colorado, case, of 1895, Moore, *Digest*, VI, p. 841; for

explain a policy which aggressively holds other states to accountability, and at the same time refuses to admit its own responsibility for the same injuries, offering instead its generosity in making reparation. When, to an asserted claim, a weak denial is opposed, still further weakened by an ultimate payment called *ex gratia*, the reluctance of the United States formally to admit its liability seems inexplicable. The payment is in itself confession of such liability.³⁰ If payment is to be made, there seems to be no reason why full credit should not be had in a cognizant public opinion, and in the elimination of the attacks to which we are at present subjected when claims are presented by other states.³¹ It is even more important, from the viewpoint of the upbuilding of international law, that acknowledgment should be made of the principle of responsibility in every case in which we recognize such responsibility to exist.³²

On the other hand, it is to be observed that the circumstances

the Hahnville, La., case, 1896, *ibid.*, VI, pp. 843-845; for the Tallullah, La., case, 1899, *ibid.*, VI, pp. 845-848; for the Erwin, Miss., case, 1901, *ibid.*, VI, pp. 848-849; for the *Albano Case*, at Tampa, Fla., 1910, 38 Stat., 1229. I have found no record of payment in the cases at Rock Springs, Texas, 1910, *For. Rel.*, 1911, p. 349; at South Omaha, 1909, Hyde, *International Law*, I, p. 520, note 1; of Joe Speranza, 1915, and Albert Piazza, 1914, in southern Illinois, Watson, in *Yale Law Journal*, XXV, p. 561.

³⁰ "Reparation in any case is acknowledgment of liability," Goebel, in *A. J.*, VIII, p. 810; and see Tchernoff, *Protection*, p. 338.

³¹ One of the demands made by Italy in the New Orleans case of 1891 was "the recognition, in principle, that an indemnity is due to the relatives of the victims," Baron Fava, March 31, 1891, Moore, *Digest*, VI, p. 938. In the fifth case of lynching of Italians at Erwin, Miss., the Italian ambassador protested against "a denial of justice, a flagrant violation of contractual conventions, and a grave offense to every human and civil sentiment," and asserted that Italy "would not cease to denounce the systematic impunity enjoyed by crime, and to hold the Federal Government responsible therefor," *ibid.*, VI, pp. 848-849. And see *Clunet*, 1891, p. 1142; Hall, *International Law*, p. 270, note.

"And yet the Government has persisted in declaring that such payments must not be regarded as an acknowledgment of liability. In a word, the United States, when not the aggrieved party clings still to a doctrine out of all harmony with the recognized practice of nations, a practice which it has uniformly required other nations to observe," Lansing, in *Proc. Am. Soc.*, II, p. 59; and see p. 60.

³² "Chaque conflit ou la responsabilité de l'État est reconnu n'est pas seulement un de conservation des principes existants, mais aussi une lente élaboration de nouveaux principes. Un État, en se fondant sur un droit strict, declare qu'il ne se considère pas comme responsable juridiquement; cela n'empêche pas de se considérer comme tenu d'une obligation morale, et de se comporter comme s'il y avait été astreint par une obligation légale. Ou encore, un État, sans accepter le principe d'une indemnité pour tous les cas analogues qui se représenteront se declare tenu dans un cas déterminé. Mais qu'on ne s'y trompe pas. L'obligation morale d'un État se considère comme tenu par une acte de sa volonté unilaterale devient vite une obligation strictement juridique, quand on se trouve en presence d'États qui declarent que l'obligation morale n'en pas une," Tchernoff, *Protection*, p. 273.

have not always supported a claim against the United States as justifiable under the rules above laid down. In several cases, enough evidence has been available for purposes at least of fair argument to show that there was no lack of due diligence on the part of the authorities, and to reveal a proper procedure, under domestic law, of judicial modes of redress.³³ It must be observed again that the responsibility does not hinge upon the mere occurrence of mob action, but upon a negligent failure upon the part of the government itself. Even so, it is still not to be supposed that the prevalence of "lynch law" in the United States, and the persistent refusal of juries to convict participants in such action, will be regarded by foreign states as measuring up to international standards.

It is obvious that internal reform is badly needed. Under present legislation, the responsibility which international law places upon the United States for the protection of aliens, often devolves upon obscure localities entirely out from under its control. These localities have proved themselves to be not only irresponsible, but quite impotent to handle the blind and reckless activities of mobs.³⁴ The situation of the citizen himself requires amelioration; but the demands of international law make it imperative that some action be taken, at least with regard to aliens. A long succession of Presidents have urged that Congress pass the necessary legislation, but so far vainly.³⁵ The Federal courts now have jurisdiction of civil suits brought by aliens over a certain sum;³⁶ and, as President McKinley expressed it in strong words:

³³ Various cases are discussed under this aspect in Hyde, *International Law*, I, § 290. See, e.g., the Denver case, Moore, *Digest*, VI, p. 821.

³⁴ "Trivial effort to afford protection has at times been the only response to warnings of the violence to be anticipated. The attempts to prosecute have usually been a travesty upon justice. Inquests over the remains of victims have been purposeless. Oftentimes local officials have failed to discover any responsible perpetrators of the acts committed. Even when such persons have been known grand juries have usually failed to indict. . . . Frequently, a painful lack of efficiency or zeal on the part of the local officials entrusted with the duty of prosecution has resulted in a miscarriage of justice," Hyde, *International Law*, I, pp. 517-518. An interesting description of the practical difficulties encountered is given by Watson, in *Yale Law Journal*, XXV, p. 561.

³⁵ See quotations from Presidents Harrison, Cleveland, and McKinley, in Moore, *Digest*, VI, pp. 839-840, 842-845-848; Hyde, *International Law*, I, pp. 469-470; Garner, in *Proc. Am. Soc.*, 1927, pp. 53-54.

³⁶ U. S. *Comp. Stat.*, 1918, § 991 (17), and § 1016, quoted in note 26, p. 108, *supra*; Hyde, *International Law*, I, p. 470, note 1. The Constitution, according to Mr. Hyde, *loc. cit.*, would permit aliens to seek the protection of Federal courts, if Congress would pass the necessary legislation.

If such jealous solicitude be shown for alien rights in cases of merely civil and pecuniary import, how much greater should be the public duty to take cognizance of matters affecting the life and the rights of aliens under the settled principles of international law, no less than under treaty stipulations in cases of such transcendent wrongdoing as mob murder, especially when experience has shown that local justice is too often helpless to punish the offenders.

§ 40. The various factors which enter into the problem of responsibility for mob injuries have made it difficult for statesmen to examine it in an analytical manner; and, for the most part, they have made little attempt to do so. On the one hand, when in aggressive mood, they make claims upon the general backing of universal reprobation against such crimes, and the conviction that the state should have in some manner protected aliens against them. On the other hand, in defensive posture, they compare the raging passions of the mob with the blind forces of nature, and assert the impossibility of controlling either. While the United States has perhaps been the chief offender in this respect, other states as well have sought to disclaim responsibility in principle for damages due to riotous disturbances within their own territories, while at the same time they have demanded reparation in behalf of their nationals similarly injured abroad.³⁷

As a matter of fact, deducible from the present practice of states, the element of *force majeure* need not be considered, further than it may fit into the rule of due diligence. If the emergency is greater, the precautions taken by the state should be correspondingly greater.³⁸ As compared with the action of a single individual, that of a mob is much more dangerous, and requires more imposing measures of opposition. Again, the movement of a mob is in-

³⁷ In the *Aigues-Mortes Case*, Italy asserted that "la réparation due par le gouvernement français sera complet lorsqu'il accordera, comme nous ne doutons pas, une juste indemnité aux victimes d'Aigues-Mortes"; yet she stipulated that her own payment to France for damages due to repercussions in Italy was an act of generosity! *R. D. I. P.*, I, p. 171. As to the positions taken by France and Spain in the *Saida Case*, see note 2, p. 126, *supra*, *Arch. Dip.*, 2nd Ser., VII, p. 57.

³⁸ Not that extraordinary measures are needed to combat a mob. Its success is ordinarily not so much due to the physical inability or cowardice of police, as to political cowardice. That a few well-directed shots will break up a mob has often been proved. In the New Orleans Riot of 1851, "it is a significant fact that in no case where the police made the attempt did they fail to check the rioters," Report of U. S. Attorney Bradford, Moore, *Digest*, VI, p. 812. See also Mr. Sherman to Mr. Hengelmüller, January 20, 1898, *ibid.*, VI, p. 871; Hahnville lynching, *For. Rel.*, 1896, p. 408; Borchard, *Diplomatic Protection*, p. 214.

evitably attended with a larger degree of publicity, if not also of delay in striking, than that of an individual; and the authorities have correspondingly more time for preparation. If experience reveals that the court may be affected by its environment, special legislation may be necessary to prevent denial of justice in such cases. In the New Orleans case of 1851, it was admitted that a special duty of protecting consuls was laid upon the United States; and if special treaty obligations are found, responsibility is so much the greater.³⁹

The very characteristics of mob action render it probable, if one may judge by past instances, that negligence on the part of the state will be established, in the failure to prosecute, if not in the failure to prevent. The extraordinary waves of popular passion which produce the tumult are apt to infect the authorities as well, to the extent of idle observance, if not of actual participation. Conviction of members of the mob has usually been impossible, even though they have been known, for witnesses are spirited away or frightened into silence; and the jury, swayed by the same emotions which actuated the mob, will rarely declare the accused guilty. Anti-racial, religious, or other feelings, prove stronger than respect for law. In most important cases, it will be found that many such factors enter indiscriminately into the confusion; and any one of them may be sufficient to establish the responsibility of the state. Thus, in the Salonica affair of 1876, the authorities had been warned and had taken no action; the officers refused to order out their troops until the victim had been released; the mob was stirred by hatred of the Bulgarians and by religious fanaticism; and Germany, with the approval of the other European states, declared the sentences decreed insufficient.⁴⁰

³⁹ Mr. Webster to Mr. Calderon, Moore, *Digest*, VI, pp. 812-813. Provision is made by Federal statute for the protection of foreign officials, *Rev. Stat.*, Sections 4062-4064. The French law, taking cases out of the hands of a jury, has already been noted, p. 67, *supra*. See also the reply of the Committee of Jurists of the League of Nations in 1923: "The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance in his behalf," *Official Journal*, League of Nations, 1924, p. 524. See Borchard, *Diplomatic Protection*, p. 216 and note 1; and p. 221; Moore, in *Columbia Law Times*, V (1892), p. 212; Treaty of 1846 with New Granada, Moore, *Digest*, VI, p. 819.

⁴⁰ *Br. and For. St. Pap.*, 67, p. 917. Consider also the Lienchou Riots, *For. Rel.*, 1906, I, p. 308; *Don Pacifico Case*, *Br. and For. St. Pap.*, 39, p. 332; Rock Springs, Wyoming, case, in Moore, *Digest*, VI, p. 822. See Borchard, *Diplomatic Protection*, p. 220; Watson, in *Yale Law Journal*, XXV, p. 561.

The result of such conditions is that, statistically taken, state responsibility may be predicated in almost every mob case. But this is merely a matter of numerical calculation of actual results; and it does not follow that one may assume either that responsibility does, or does not, exist for any mob violence simply because it is mob violence. If a state is in proportion more often held responsible for mob action than for the acts of individuals, it is because due diligence is in the former case more apt to be lacking, or a denial of justice more apt to be present; but the negligence or the denial of justice must be proved in each individual case before responsibility is established. The rules upon which responsibility in mob cases is founded are the same in principle as those by which responsibility for individual acts is estimated.⁴¹

§ 41. The conclusions above expounded may be applied also to the responsibility of states for damages arising out of civil war. But while in the case of mob injuries the result is almost always to fix responsibility upon the state, the operation of the same rules, due to quite different factors, produces very nearly the opposite results in the case of civil war injuries. Belligerent action represents the extreme extent of injury which can be occasioned within a state; but it also necessarily calls into play the utmost energies of the state, with the result that lack of due diligence can rarely be imputed to the state. Nevertheless, such cases do occasionally appear.

The attempt to escape responsibility for the imposing damages which accumulate in time of civil war has led to the devising of a number of unique theories. Indeed, it would be difficult to discover, within the limits of this subject, and perhaps within the whole range of international law, a more widely controverted question; for civil war is an exceptional condition, precipitating discussions which must be founded upon both the law of war and the law of peace, and which oftentimes seem to belong to neither. The political, rather than legal, character of the action taken has tended to further confusion. It is only in recent times that the rules upon which decision should be based in regard to claims for

⁴¹ "The principles governing the responsibility of the state for injuries sustained by aliens as a result of mob violence are closely related to those governing its responsibility for injuries committed by individuals," Borchard, *Diplomatic Protection*, p. 220. See Ralston, *Law and Procedure*, § 642; Hyde, *International Law*, I, p. 517; and compare the wording of Article 3 and Article 7 of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

civil war damages have emerged to such a degree that they can be analyzed; and confusion of thought is still apparent.

Various theories have been put forward to justify a rule of complete responsibility for civil war damages, and to account for its apparent harshness.⁴² In several of its sessions the *Institut de Droit International* has sought, in long discussions, to find a basis for damages suffered by aliens in civil wars.⁴³ Much interest was aroused by Brusa's theory of expropriation. Whenever (he urged) the state, for public good, draws a profit from the losses of an individual, the state should indemnify him for those losses. The sovereign state does not have a power so great that it can dispose of the property of individuals without recompense. The general interest which the government has the right to pursue does and ought to prevail over the individual interest; but the sacrifice which the individual makes means a profit to the state as a whole for

⁴² From the great amount of literature upon this topic, the following titles are suggested, most of them containing critical discussions of the theories here mentioned:

H. Arias, "The non-liability of states for damages suffered by foreigners in the course of a riot, an insurrection, or a civil war," *A. J.*, VII, p. 724; L. de Bar, "De la responsabilité des États à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute, ou de guerre civile," *R. D. I. L. C.*, 31 (2nd Ser., 1), pp. 464-481; J. Basdevant, "L'action coercitive anglo-germano-italienne contre le Venezuela (1902-1903)," *R. D. I. P.*, XI, pp. 362-458; E. Brusa, "Responsabilité des États à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile," *Annuaire*, XVIII (1900), pp. 96-137; P. Breton, *De la responsabilité des états en matière de guerre civile touchant les dommages causés à des ressortissants étrangers*, Nancy Dissertation, 1906; Ch. Calvo, "De la non-responsabilité des États à raison des pertes et dommages éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles," *R. D. I. L. C.*, I (1869), p. 417; J. Goebel, Jr., "The International Responsibility of States for injuries sustained by aliens on account of mob violence, insurrections, and civil wars," *A. J.*, VIII (1914), pp. 802-852; C. C. Hyde, "Mexico and the Claims of Foreigners," *Illinois Law Review*, VIII, p. 355; L. A. Podesta-Costa, "International responsibility of the state for damages suffered by aliens during civil war," 31st Report of the International Law Association (1923), p. 119; Ch. Strupp, "Responsabilité de l'État en cas de dommages, causés aux ressortissants d'un État étranger en cas de troubles, d'émeutes, ou de guerres civiles," *ibid.*, p. 127; G. Muszack, *Ueber die Haftung einer Regierung für Schäden welche Ausländer gelegentlich inneren Unruhen in ihren Landen erlitten haben*, Heidelberg Dissertation, 1905; A. Rougier, *Les Guerres Civiles et le Droit des Gens*, Paris, 1903; H. de Vaulx, *La responsabilité de l'État français à raison des dommages causés par les faits de guerre*, Verdun dissertation, 1913; C. Wiessé, *Le Droit International appliqué aux guerres civiles*, Lausanne, 1898. "Responsibility of States for injuries suffered by foreigners within their territories on account of mob violence, riots, and insurrections," J. W. Garner, in *Proc. Am. Soc.*, 1927, p. 49.

⁴³ See Volumes XVIII, XIX, XX, of the *Annuaire de l'Institut*; and the discussions by Brusa and Bar, cited in the preceding foot-note. The *Institut* again discussed the subject of civil war injuries at its 1927 meeting at Lausanne, this time from a more positivist viewpoint. See Appendix III, *infra*. Borchard lists five theories, *Diplomatic Protection*, p. 229.

which he should be recompensed. Impositions have been laid upon him for the benefit of the whole group, which, as a whole, should indemnify him for the very reason that it derives profit therefrom. Similarly, the general good which it is the end of the state to obtain may necessitate civil war and individual misfortune. The needs of the state may legitimate injurious acts; but such necessity does not exempt the state from the duty of indemnification. *Force majeure* may justify the conduct of the state; but it still leaves existent the duty to indemnify. If the state uses the legitimate rights of the individual for the benefit of all, all should together be obliged to make compensation.⁴⁴

At the following meeting, in the discussion upon Brusa's amended report, M. Fauchille advanced the theory of *risque étatif*. This idea he drew from the recent legislation of France: *risque professionnel* for writers; *risque judiciaire* for judicial errors; *risque administratif* for damages due to public works. Since aliens are to be regarded as a source of profit to the state in which they reside, why should there not be also a *risque étatif* obligating the state to repair damages suffered by them? Thus the state would assume the risk of protecting those from whom it draws a profit.⁴⁵ Another group, among whom Wiesse is included, argue that the state is at fault in that it permitted civil war to occur at all; and that, in this fault, responsibility is founded.⁴⁶ War, they argue, is not a matter

⁴⁴ Brusa, *op. cit.*, *passim*. Especially at p. 56: "L'indemnité est due comme simple obligation de compenser les profits et avantages que l'état a retirés des biens et personnes des étrangers pour combattre les rebelles et réprimer les séditeux, les émeutiers, etc. notamment de ceux qu'il a admis dans son pays avec espérance ou engagement pour en faire bénéficier ce dernier." Brusa does not seem to have received much support, particularly with regard to the idea that the state benefits from the alien. See Rougier, *Guerres Civiles*, p. 469; Breton, *Responsabilité*, p. 65; Bar, *loc. cit.*, *passim*.

⁴⁵ *Annuaire*, XVIII, p. 233; and Fauchille, *Traité*, I, p. 521. This position must be differentiated from the opposite theory of individual risk, which asserts that an individual enters a strange country for his own profit and at his own risk. "Celui qui s'établit dans un pays étranger accepte les chances de bonheur et de malheur que ce pays offre à ces habitants et il ne peut exiger, à titre d'étranger, une protection particulière et privilégiée que l'État en question n'accorde même pas à ses propres sujets," Bar, *loc. cit.*, p. 470. See also Goebel, in *A. J.*, VIII, p. 815; Hyde, in *Illinois Law Review*, VIII, p. 362; Strupp, in *31st Report of the International Law Association*, p. 133; Baudin to Cuevas, October 27, 1838, *Br. and For. St. Pap.*, 27, p. 1177; *W. C. Tripler Case*, Moore, *Arbitrations*, p. 2997; Rougier, *Guerres Civiles*, p. 472; Breton, *Responsabilité*, pp. 68-71; Anzilotti, *Teoria*, p. 111; Hall, *International Law*, p. 274.

⁴⁶ Wiesse, *Droit International*, pp. 45, 52. Rougier states the theory without accepting it, *Guerres Civiles*, p. 468. See *Annuaire*, XVII, p. 100.

of *force majeure* at all, since its employment is voluntary. International law offers other means than war for the solution of difficulties: it is not an act of nature, to be compared with plague, fire, or earthquake, but a voluntary act of man. To refuse indemnity is an abuse, to which aliens are not required to submit, even though citizens may be.

There is a manifest similarity between these and other doctrines,⁴⁷ varied as they are. All are connected with the *raison d'être* of the state, and with the authority which it possesses for the accomplishment of its purposes. None of them would admit the former theory of absolute sovereignty, that the state is all powerful and irresponsible, even to the extent of destroying or confiscating private property when it considers such action desirable for its own needs. The state exists for its members, not they for it. All represent a striving toward the currently urged theory of the state as a collectivity existing for the benefit of its members, and conscious of a national solidarity making all willing to share the burdens of individuals injured in its behalf. If, then, an individual suffers in civil war, either through insurgent or governmental act, his injury has been received in behalf of the state and should be repaired by the state.⁴⁸ International law cannot, of course, interfere with the relations between a state and its citizens; but it can maintain a high standard where aliens are concerned.

§ 42. However great the theoretical interest of these proposals may be, and of however much value in the future building of international law, it may be said that practice is now definitely against them. The conclusion to which the *Institut* finally came was in favor of responsibility, with exceptions;⁴⁹ practice, at least when tested by the numerical majority of decisions, has apparently declared in favor of irresponsibility, with exceptions. Such was the opinion of the Umpire in the *Aroa Mines Case*:

⁴⁷ Borchard mentions the theory of state assurance, *Diplomatic Protection*, p. 229. Breton puts it upon a contractual basis, *Responsabilité*, p. 74. Guerrero, for the Committee for Progressive Codification, *Responsibility*, pp. 11-12, rejects them all. See also Strupp, *Völkerrechtliche Delikte*, p. 96.

⁴⁸ Of course, if the individual is an insurgent, he can hope for no relief unless his party succeeds.

⁴⁹ *Règlement* adopted by the *Institut de Droit International*, September 10, 1900, *Annuaire*, XVIII, pp. 253-256. It will be found translated in Moore, *Digest*, VI, pp. 953-954; and in Ralston, *Venezuelan Arbitrations*, p. 733. Compare with Article 7 of the Resolutions adopted at its 1927 meeting, Appendix III, *infra*.

The precedents form an unbroken line, so far as the umpire has been favored with a chance to study them, supporting the usual non-responsibility of governments for the acts of unsuccessful rebels.⁵⁰

The opinions of writers agree overwhelmingly with this statement of the situation. Thus Hall, in his usual forceful style, says:

When a government is temporarily unable to control the acts of private persons within its dominions owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority, or through acts done by the part of the population which has broken loose from control.⁵¹

The United States, of course, rejected all responsibility for damages sustained by aliens in consequence of the military operations of the Union during her Civil War; and this attitude was subsequently upheld by arbitral decisions.⁵² Her attitude toward other

⁵⁰ Umpire Plumley, in the *Aroa Mines Case*, Ralston, *Venezuelan Arbitrations*, p. 382. He cites a number of cases himself; and refers to the opinion of Umpire Ralston in the *Sambiaggio Case*, in which a large number of citations are collected, *ibid.*, p. 680. Other cases will appear in the following discussion.

⁵¹ Hall, *International Law*, p. 274. Mr. Borchard's statement may be accepted as correct: "These theories, however interesting, have all been abandoned, and the doctrine which has now received general support, is that on principle the state is not responsible for the injuries sustained by aliens at the hands of insurgents in civil war unless there is a proven fault or a want of due diligence on the part of the authorities in preventing or in suppressing the revolution," *Diplomatic Protection*, p. 229. Mr. Borchard appends some three pages of citations in support, *ibid.*, pp. 229-232. Podesta-Costa asserts that doctrine is almost unanimously for the irresponsibility of the state, *31st Report of International Law Assn.*, 1923, p. 119. Strupp, *ibid.*, p. 133, and *Völkerrechtliche Delikt*, p. 99, and note 2; Fauchille, *Traité*, I, p. 518; Hyde, *International Law*, I, pp. 538-539; Tchernoff, *Protection*, p. 377; Wiesse, *Droit International*, p. 104; Calvo, *Droit International*, III, p. 142; Bar, *loc. cit.*, *R. D. I. L. C.*, 1899, p. 464; Arias, in *A. J.*, VII, p. 731; de Visscher, *Responsabilité*, p. 104; Schoen, *Haftung*, p. 78; editorial discussion in *R. D. I. P.*, I, p. 176; IV, pp. 403, 416; Rougier, *Guerres Civiles*, p. 122; Borchard, in *Yale Law Journal*, XXVI, p. 339.

"In most cases in which damages have been claimed for such losses, the States concerned have refused to comply with the request," Oppenheim, *International Law*, I, p. 261, who adds that Goebel (*A. J.*, VIII, p. 817) does not prove otherwise. Mr. Moore quotes to the same effect, Calvo, *Droit Int.*, III, § 1280; Pradier-Fodéré, *Traité*, I, p. 343, § 205; Fiore, *Droit International Public*, I, § 675; Hall (as above); Pillet, *Les lois actuelles de la guerre*, p. 29; and the Règlement of the Institut (see note 49, *supra*), Moore, *Digest*, § 1044.

⁵² "It is believed that it is a received principle of public law, that the subjects of foreign powers domiciled in a country in a state of war, are not entitled to greater privileges or immunities than the other inhabitants of the insurrectionary district. . . . By voluntarily remaining in a country in a state of civil war, they must be held to

states in the same situation has been marked by inconsistency.⁵³ She has often asserted and enforced responsibility for damages to her citizens due to insurrectionary disturbances in other states;⁵⁴ though it is to be observed that she has, on various occasions, refused to press such claims.⁵⁵ A similar inconsistency is noticeable in the practice of European states.⁵⁶

have been willing to accept the risks as well as the advantages of that domicile," Mr. Seward to Count Wydenbruck, November 16, 1865, Moore, *Digest*, VI, p. 885. In the *Prats Case*, Commissioner Wadsworth asserted that "Nonresponsibility on the part of the United States for injuries by the Confederate enemy within the territories of that government to aliens did not result from the recognition of the belligerency of the rebel enemy by the stranger's sovereign. It resulted from the *fact* of belligerency itself, and whether recognized or not by other governments," Moore, *Arbitrations*, p. 2889.

While such broad statements as these could hardly be maintained, the elements of due diligence, and of recognition of the belligerency of the Confederacy, afford ample justification for the course pursued by the United States. In *Hanna's Case* "The Commissioners are of opinion that the United States can not be held liable for injuries caused by the acts of rebels over whom they could exercise no control, and which acts they had no power to prevent," *ibid.*, p. 2984. Even better was the statement of Seward, that a government was not liable for injuries committed by insurgents, provided it adopted "expedient and available measures to suppress the rebellion," Mr. Seward to Baron Gerolt, January 9, 1866, Moore, *Digest*, VI, p. 958. See also Mr. Fish to Mr. Thornton, May 16, 1873, *ibid.*, VI, pp. 889-890; Mr. Fish to Mr. Gibson, December 30, 1875, *ibid.*, VI, p. 891; *Cases of Laurie and Others*, Moore, *Arbitrations*, p. 2987; *Stewart*, *ibid.*, p. 2989; *Campbell*, *ibid.*, p. 2990; *Alleghanean*, *ibid.*, p. 1622.

⁵³ This inconsistency has been recognized by the Department of State itself: "In regard to the question of the liability of a Government for the acts of insurgents whom it could not control, it may be admitted that there is some contrariety in the opinions the Department has heretofore expressed," Mr. Rives to Mr. Buck (*McCord Claim*), October 8, 1888, *For. Rel.*, 1888, II, p. 1375. It has on this account been open to attack, e.g., Mr. Seward to Baron Gerolt, January 9, 1866, Moore, *Digest*, VI, p. 958; Mr. Fish to Mr. Foster, December 16, 1873, *ibid.*, VI, pp. 975-978. See Fenwick, *International Law*, p. 395, note 4; Hyde, *International Law*, I, pp. 538-539.

⁵⁴ Case of the steamer *Montijo*, seized by Colombian revolutionists, Moore, *Digest*, VI, pp. 973-974, Moore, *Arbitrations*, p. 1421; *Case of Messrs. Ulrich and Langstroth*, Moore, *Digest*, VI, pp. 974-980; *Case of the Venezuelan Steam Transportation Co.*, Moore, *Arbitrations*, p. 1693; *Daniel L. Pope Claim*, *ibid.*, p. 2972; *Jarvis Case*, Ralston, *Venezuelan Arbitrations*, p. 145; *McCord Claim*, Moore, *Digest*, VI, pp. 985-990, *For. Rel.*, 1888, II, p. 1366; Mr. Scruggs to Mr. Fish, May 18, 1876, Moore, *Digest*, VI, p. 981.

⁵⁵ "The Department of State, while declining to present a claim for damages inflicted by the insurgents, said that it was very doubtful also whether a claim could be made for injuries inflicted by Government forces," Mr. Olney to Mr. Thompson, January 29, 1896, Moore, *Digest*, VI, p. 892. See also Mr. Fish to Mr. Washburne, April 28, 1871, *ibid.*, VI, p. 888; Mr. Fish to Mr. Niles, October 30, 1871, *ibid.*; Mr. Bayard to Mr. O'Connor, October 29, 1885, *ibid.*, VI, p. 891; Mr. Forsyth to Mr. Hunter, March 13, 1839, *ibid.*, VI, pp. 954-955; Mr. Rockhill to Mr. Lithgow, September 18, 1896, *ibid.*, VI, p. 955; Mr. Seward to Mr. Smith, July 9, 1868, *ibid.*, VI, p. 956; Mr. Davis to Mr. Markbreit, July 7, 1871, *ibid.*, VI, p. 959; Mr. Bayard to Mr. Sutphen, January 6, 1888, *ibid.*, VI, pp. 961-964; Mr. Olney to Messrs. Lauman and Kemp, January 13, 1896, *ibid.*, VI, p. 967.

⁵⁶ Mr. Goebel asserts that "responsibility has become in Europe a recognized fact

It is a notorious fact, upon which one is free to put his own construction, that successful claims for damages due to civil war disturbances have rarely been prosecuted except against the Latin-American states, or occasionally against other weaker states. It is not necessary to conclude, however, that such action is always the bullying conduct of a more powerful against a weaker state unable to resist. While, as has been repeatedly said, a state is left free to choose its own machinery, still, to quote Hall, "it cannot avoid international responsibility on the plea of a deliberate preference for anarchy."⁵⁷ The duty of the state is usually to extend to the alien the same protection as its own citizens receive, provided this

of international law and states are gradually coordinating theory and practice to an ever increasing extent," *A. J.*, VIII, p. 819. This statement is denied by Oppenheim, *International Law*, I, p. 261; and while Mr. Goebel has collected cases with amazing industry, he has not succeeded in proving more than that, toward weaker states, European powers have often asserted liability. See note 51, p. 142, *supra*. Mr. Goebel thinks of responsibility in an absolute sense: the state is responsible or not responsible for all civil war injuries, as a group. Really, as will be seen shortly, responsibility is contingent upon various factors, differing in every case.

The famous notes of Schwarzenberg and Nesselrode, long influential in this connection, are dismissed by him as an inaccuracy of Calvo's, since neither the British nor other Governments have accepted the statements therein. This inaccuracy is also noted by Borchard, *Diplomatic Protection*, p. 229, note 7; and is discussed by Mr. Moore, *Digest*, VI, pp. 977-980. The British Government having made claims for damages in Tuscany, Austria denied liability, but expressed a willingness to refer them to Russian arbitration. Nesselrode, however, emphatically asserted that the law was clear that no responsibility existed for such cases, and refused on this ground to arbitrate, *Laurence's Wheaton*, III, pp. 128-129. If, however, England did not admit the doctrine of Nesselrode, neither was she able to enforce her own theory, except against weaker states. The European states have consistently refused to recognize responsibility in such cases, as has also the United States. France has taken a similar position in her various revolutions, Calvo, in *R. D. I. L. C.*, I, p. 425; Rougier, *Guerres Civiles*, p. 451; Breton, *Responsabilité*, pp. 131, 147. She has, however, provided *secours*, to alien and national equally. The Belgian Government denied responsibility for damages during her revolution of 1830, Moore, *Digest*, VI, p. 947. For injuries occurring during the long period of disturbance in Cuba, Spain rejected responsibility, *Wilson Case*, Moore, *Arbitrations*, p. 2982, Moore, *Digest*, VI, pp. 959-960; and *Sáida* incident, *Arch. Dip.*, 2nd Ser., VII (1882-1883), p. 57. "The undersigned would find no difficulty in referring the Prussian Government to numerous cases in which the leading powers of Europe, such as Great Britain, Austria, and Russia, have accepted and adopted the principles upon which the United States now stands," Mr. Seward to Baron Gerolt, January 9, 1886, Moore, *Digest*, VI, p. 958.

On the other hand, while denying responsibility for their own disturbances, these states have frequently asserted and enforced, even at the points of guns, their claims for injuries received in similar disturbances elsewhere, particularly in Latin-American states, but also in Greece, Portugal, and elsewhere. The intervention in Mexico at the time of our Civil War is well known, as well as the coercive actions directed against Venezuela. Other cases will appear *infra*.

⁵⁷ Hall, *International Law*, p. 272. "This doctrine [of due diligence] is predicated

protection is sufficient. It is as true in the case of civil war injuries as elsewhere that, if the protection given to the alien does not measure up to the international standard, responsibility may be claimed. The *Institut de Droit International* recommended that

states which, by reason of extraordinary circumstances, do not feel able to insure in a sufficiently effective manner the protection of foreigners on their territory, can escape the consequences of such a state of things only by temporarily denying to foreigners access to their territory.⁵⁸

Chronic civil disturbances have, in some of these states, demonstrated their failure to measure up to the standard required; and while it is probably true that, in some cases, advantage has been taken of them as weaker states, it would not do to assume that every attempt to collect indemnity from them for civil war injuries represents unwarranted aggression.⁵⁹

The records display a long list of insistent and severely pressed claims against certain of the Latin-American states.⁶⁰ These states have usually, perforce, paid; but they have done so under protest, denominating their payments as *secours* rather than as indemnity; and they have, as has been seen, devised many ingenious though vain schemes for evading responsibility.⁶¹ Such efforts are easily to be

on the assumption that the government is reasonably well-ordered, and that revolutions and disorder are abnormal conditions," Borchard, *Diplomatic Protection*, p. 230. See Poggioli *Case*, Ralston, *Venezuelan Arbitrations*, p. 869; Sambiaggio *Case*, *ibid.*, pp. 679-680.

⁵⁸ From the *Réglement* of September 10, 1900, quoted in Moore, *Digest*, VI, p. 954.

⁵⁹ "Their very weakness in maintaining a stable government has, in fact, often been the actual if not the ostensible reason for imposing liability on some of the Latin-American states for injuries sustained by aliens in civil war," Borchard, *Diplomatic Protection*, p. 232, note 2. "The possibility that the privilege would be abused by an exaggeration of the loss sustained by the aggrieved party can not be admitted as even a plausible argument against it," Mr. Fish to Mr. Foster, December 16, 1873, Moore, *Digest*, VI, p. 976. See editorial comment in *R. D. I. P.*, II, p. 339; III, p. 478; Bar, in *R. D. I. L. C.*, 31, p. 464; Goebel, in *A. J.*, VIII, pp. 831-832.

⁶⁰ See the figures given by Borchard, *Diplomatic Protection*, p. 857, note 2. Also, Basdevant, in *R. D. I. P.*, XI, pp. 362-458; Promemoria of German Embassy, *re* Venezuela, December 11, 1901, *For. Rel.*, 1901, p. 193; operations against Mexico in 1861, *Br. and For. St. Pap.*, 51, p. 63; civil wars in Brazil, *R. D. I. P.*, IV, p. 403; and in Chile, *ibid.*, III, p. 485, and IV, p. 416. Ralston, *Venezuelan Arbitrations of 1903* (Washington, 1904), contains the cases before the various commissions (American, Belgian, British, French, German, Italian, Mexican, Netherlands, Spanish, and Swedish-Norwegian) which considered the responsibility of Venezuela for her long period of disorder. Many other cases are given in Moore's *Arbitrations*; and see the article by Goebel, *A. J.*, VIII, p. 831.

⁶¹ See Sec. 33, *supra*; and Sec. 49, *infra*.

explained, as a matter of self-defence; but, however much one may sympathize with them, they are based upon an antiquated conception of sovereign irresponsibility, and must inevitably prove futile. Hope for these states lies rather in the establishment of stable and effectively working systems for the protection of aliens. The state which is consistently unable to meet its international obligations has no claim to membership in the family of nations. Penalties and restrictions will become increasingly burdensome; and its ultimate absorption by a state which is able to assume responsibility for the protection of rights within it is within the bounds of historical record and of reason.⁶²

§ 43. While the cases, when they have been added up, apparently indicate that states are not responsible for the acts of unsuccessful revolutionists, it may nevertheless be established that there is no departure from the general rule of responsibility already laid down. If tribunals have refused to hold states responsible in such cases, it is not because of any separate classification of civil war injuries with non-liability therefor in all cases, but simply because, due diligence having been exercised by the state in its efforts to restrain and redress insurrectionary action, the state has fulfilled its international obligations, and owes no responsibility.⁶³ But before

⁶² "Indeed, to declare that because the Mexican nation has suffered all the evils inseparable from a state of revolution and civil wars, therefore the foreigners residing therein are to bear these evils without any hope of alleviation: this is the terrible argument of an exalted patriotism, honorable in its origins, perhaps, but whose results are opposed to reason, humanity, and the true interests of the country. Were anything required to keep alive the spirit of universal commotions and revolutions in Mexico, it would surely be the fatal doctrine that no indemnity should ever be granted, either to foreigner or to natives, for the losses which they may sustain in these intestine disorders. Such doctrines foment disorders, and tend to perpetuate anarchy: proclaim the contrary and civilization and order and the laws would all be gainers. When a nation knows not how to maintain order in its bosom, it must learn how to punish itself," Admiral Baudin to Cuevas, October 27, 1838, *Br. and For. St. Pap.*, 27, p. 1178; and see the quotation from the *R. E. Brown Claim* opinion, in note 29, p. 109, *supra*. Also, Goebel, in *A. J.*, VIII, p. 831; President Murillo to the Colombian Congress, Moore, *Digest*, VI, p. 956; Annual Message of President Jackson, December 7, 1835, *ibid.*, VI, p. 973; Hyde, in *Illinois Law Review*, VIII, pp. 360-361; Fenwick, *International Law*, p. 395, note 1.

⁶³ "The mere 'revolutionary state' of a part of Mexico can not be accepted by the United States as a defense to a claim on Mexico for injuries inflicted on citizens of the United States in Mexico in violation of treaty obligations," Mr. McLane to Mr. Butler, June 20, 1834, Moore, *Digest*, VI, p. 972; and see *McCord Case*, *For. Rel.*, 1888, II, p. 1374; Mr. Knox to the Mexican Chargé in Mexico, *ibid.*, 1912, p. 984; Hyde, *International Law*, I, p. 538; Strupp, *Völkerrechtliche Delikt*, pp. 102-103; Schoen, *Haftung*, p. 79; de Visscher, *Responsabilité*, p. 104; Fenwick, *International Law*, p. 93; Article 7 of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

considering the ordinary rules for the protection of aliens as applied to civil war injuries, it is necessary to note some exceptional characteristics of this sort of action, and their effect upon practice. The existence of an insurgent government raises questions as to the allocation, as well as to the existence, of responsibility.

If belligerent status is accorded to the rebels, it may be taken as an admission of inability to control them; and, consequently, as a warning of non-liability for their actions.⁶⁴ Such admission may be made by the parent state itself, in which case notice is served upon all other nations; or recognition of belligerency may be granted by other states, thereby incapacitating themselves from the later presentation of claims for damages done to their citizens through insurgent action.⁶⁵ If states have at times appeared to make such recognition the only criterion of responsibility, it is because inability to control insurgents is thereby recognized as an excuse for non-liability.⁶⁶

The rule is also well established that the government set up by successful revolutionists must accept responsibility for their acts as insurgents from the beginning, a conclusion logically deducible from the fact that the acts of the insurgents have now become the acts of the government, for which it must accept responsibility.⁶⁷

⁶⁴ "While the freedom of the successful government from responsibility on account of acts of insurgents which it has been unable to control is due to the fact of belligerency rather than to the relation of the claimant state thereto, the latter may, by its conduct, admit that at the time of the commission of wrongful acts by insurgents, the government lacked the power of prevention or suppression," Hyde, *International Law*, I, p. 541; and see Schoen, *Haftung*, p. 79.

"At any rate, there was one compensation, the act had released the Government of the United States from responsibility for any misdeeds of the rebels towards Great Britain," Mr. Adams to Mr. Seward, June 14, 1861, Moore, *Digest*, VI, p. 956. See Wadsworth's opinion in *Prats' Case*, Moore, *Arbitrations*, p. 2888.

Such recognition does not force other states to recognize the belligerency of the insurgents; but it puts them upon notice that the parent state may not be held responsible for the acts of the insurgents, Schoen, *Haftung*, p. 79, note 51.

⁶⁵ "France, by recognizing the insurgents as belligerents, may be expected to have accepted all the responsibility of that measure, and to be content to regard her subjects domiciled in belligerent territory as identified with the belligerents themselves," Mr. Seward to Mr. Dayton, January 12, 1864, Moore, *Digest*, VI, p. 957. See Mr. Fish to Mr. Thornton, May 16, 1873, *ibid.*, VI, p. 889; Mr. Davis to Mr. Pile, July 28, 1873, *ibid.*, VI, p. 981; Mr. Davis to Mr. Muruaga, June 28, 1886, *ibid.*, VI, p. 964; Breton, *Responsabilité*, p. 16; Borchard, *Diplomatic Protection*, p. 235; Rougier, *Guerres Civiles*, pp. 462, 476; Schoen, *Haftung*, p. 79; Strupp, *Völkerrechtliche Delikt*, p. 100; Hyde, *International Law*, I, p. 541.

⁶⁶ Mr. Fish to Mr. Hurlbut, June 21, 1871, *For. Rel.*, 1871, p. 230; Mr. Davis to Mr. Pile, July 28, 1873, Moore, *Digest*, VI, p. 891; *Prats' Case*, Moore, *Arbitrations*, p. 2888.

⁶⁷ "It was settled for this Commission by the opinion of the Umpire in the claim

It is accountable also, of course, for the illegal acts of the preceding government. *Forma regiminis mutata, non mutatur civitas ipsa.*

§ 44. It would be as incorrect to assert an absolute rule of irresponsibility for all civil war damages, as to argue a rule of absolute responsibility. Whether a state is responsible in a certain case for such damages depends upon ascertainable elements in that particular case, primarily the exercise of due diligence. Acts of insurgents, like acts of individuals, are not primarily attributable to the state; and they can be imputed to the state only if the latter has failed in its duties. No state has been willing to admit responsibility for injuries within its jurisdiction simply because they were the products of civil war; and, on the other hand, no state has been willing to accept the mere retort that the injuries upon which its claim was founded were the result of civil war, as a barrier to the presentation of such claim. The slide rule upon which such responsibility must always be calculated is the rule of due diligence.⁶⁸

of the Bolivar Railway Co., that the respondent Government, subject to certain exceptions, was liable for the acts of successful revolutionists, and for the acts of the titular government as well," *Puerto Cabello and Valencia Railway Co. Case*, Ralston, *Venezuelan Arbitrations*, p. 458; *Bolivar Railway Co. Case*, *ibid.*, p. 388; *Dix Case*, *ibid.*, p. 8; *Henry Case*, *ibid.*, p. 17; *Williams v. Bruffy*, 96 U. S. 176; Mr. Hay to Mr. Rush, May 18, 1899, Moore, *Digest*, VI, p. 960; Mr. Evarts to Mr. Foster, May 4, 1879, *ibid.*, VI, p. 992; Mr. Bayard to Mr. Buck, August 13, 1886, *ibid.*, VI, p. 992; *Hughes Case*, Moore, *Arbitrations*, p. 2972.

"That the nation is responsible for the acts and contracts of revolutionists who succeed in overturning the prior government, and establishing themselves in power, has been fully recognized by commissions; the theory invoked being that the revolutionists having succeeded, their acts from the beginning are rightfully to be considered as those of a titular government, and the final triumph of their authority should properly be given a retroactive effect, confirming and ratifying antecedent steps," Ralston, *Law and Procedure*, §§ 538, 615. See Borchard, *Diplomatic Protection*, § 96; Hyde, *International Law*, I, § 302; Goebel, in *A. J.*, VIII, p. 818; Schoen, *Haftung*, p. 80; Wright, "Bombardment of Damascus," *A. J.*, XX, p. 275, note 52, and p. 276.

This question was, however, reserved by the Institut at its 1927 meeting. See Article 7, Appendix III, *infra*.

⁶⁸ "If the government which is successful in its work of repression is to be burdened with responsibility, it must be because (a) it 'has failed to use promptly and with appropriate force its constituted authority' to oppose the revolutionists; or (b) because it has condoned by some process internationally illegal acts; or (c) because it has entered into relationships whereby it has become the legal successor to those whose conduct it previously opposed," Hyde, *International Law*, I, p. 540, quoting the *Sambiaggio Case*, Ralston, *Venezuelan Arbitrations*, p. 680. "Provided in any case it be established that the appropriate authorities omitted to take reasonable measures to suppress insurrectionists, mobs or bandits, or treated them with lenity or were at fault in other particulars," Art. III (5) of Special Claims Commission between

Statements to this effect are found recurrently in the practice of states. For example:

The general position is that the responsibility of an established government for acts committed by rioters or insurgents depends upon the failure of the constituted authorities to exercise due diligence for protection of alien property when in a position to protect it and the imminence of danger is known.⁶⁹

It is upon this ground that arbitral tribunals usually reject claims; and where such rejection is based upon the fact that damages originated in civil disturbances, the rule of the diligence is usually implicit.⁷⁰ A clear statement is found in the important *Sambiaggio Case*, where Umpire Ralston said:

The umpire therefore accepts the rule that if in any case of reclamations submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence and to prevent damages from being inflicted by revolutionists, that country should be held responsible. In the present instance no such want of diligence is alleged and proved.⁷¹

the U. S. and Mexico, September 10, 1923, *Treaty Series No. 676*, Borchard, in *A. J.*, XX, p. 542; and see Wright, in *ibid.*, XX, p. 269; Decencière-Ferrandière, *Responsabilité*, p. 162; Article 7, Resolutions of the *Institut*, 1927, Appendix III, *infra*.

⁶⁹ Mr. Olney to Messrs. Lauman & Kemp, January 13, 1896, Moore, *Digest*, VI, p. 967. "The measure of diligence to be exercised by a government in the repression of disorders is not that of an insurer, but such as prudent governments are, under the circumstances of the case, accustomed to exercise," Mr. Bayard to Mr. Sutphen, January 6, 1888, *ibid.*, VI, p. 962. In this instruction, Mr. Bayard discusses at length what is meant by diligence. For further examples of the practice of the United States, see generally *ibid.*, VI, § 1045; Wharton, *Digest*, § 223; Uhl, in *For. Rel.*, 1895, p. 1216.

Many cases are discussed in Ralston, *Law and Procedure*, §§ 622-636. Note also *R. D. I. P.*, II, p. 338; Strupp, *Völkerrechtliche Delikt*, p. 105; Borchard, *Diplomatic Protection*, p. 229; Schoen, *Haftung*, p. 78; Despagnet, *Cours*, p. 471; Hershey, *Essentials*, p. 164; Westlake, *International Law*, I, p. 330; Oppenheim, *International Law*, I, p. 260; Hall, *International Law*, p. 274; Pradier-Fodéré, *Traité*, I, § 245; *Annuaire de l'Institut*, XVIII, p. 254.

⁷⁰ "The Commissioners are of opinion that the United States can not be held liable for injuries caused by the acts of rebels over whom they could exercise no control, and which acts they had no power to prevent," *Hanna's Case*, Moore, *Arbitrations*, p. 2985. See opinions of Wadsworth and Palaccio, in *Prats' Case*, *ibid.*, pp. 2886-2900; *de Brissot Case*, *ibid.*, p. 2949; *Alleghanian*, *ibid.*, p. 1622; *Aroa Mines Case*, Ralston, *Venezuelan Arbitrations*, pp. 382, 384; *Kummerow et al.*, *ibid.*, p. 559; *Van Dissel and Co.*, *ibid.*, p. 573; *Wenzel Case*, *ibid.*, p. 592; *Guastini Case*, *ibid.*, p. 747; *Bolivar Railway Case*, *ibid.*, pp. 396-397; *Salas Case*, *ibid.*, p. 903; *Home Missionary Society Case*, Nielsen's Report, p. 425.

⁷¹ Ralston, *Venezuelan Arbitrations*, p. 692. "The umpire holds concerning the responsibility of Venezuela for the acts of unsuccessful revolutionists that the Gov-

The same principle is embodied in laws and treaties;⁷² and modern practice seems to establish the rule beyond any doubt.⁷³

It may ordinarily be presumed, of course, since the government is fighting for its life, that due diligence has been employed to suppress an insurrection. Arbitral tribunals have usually rejected indemnity where it was apparent that the full strength of the state had been put forth. Thus, in the *Kummerow Case*, Umpire Duffield said:

The modern doctrine, almost universally recognized, is that a nation is not liable for acts of revolutionists when the revolution has gone beyond the control of the titular government. . . . Immunity follows liability.⁷⁴

In the case of the Cuban insurrections, says Mr. Borchard, "as a rule, the general powerlessness of Spain to protect Cuban plantations, relieved her of liability for injuries committed by the insurgents."⁷⁵

ernment of Venezuela is responsible to aliens, comorant or resident, for injuries they receive in its territory from insurgents or revolutionists whom the Government could control, and not otherwise," *Henriquez Case*, *ibid.*, p. 899.

"But where an armed insurrection has gone beyond the control of the parent government, the general rule is that such government is not responsible for damages done to foreigners by the insurgents. If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities by the exercise of due diligence might have prevented the damages done, Spain will be held liable in that case," Rules adopted by the Spanish Treaty Claims Commission, *A. J.*, IV, pp. 818-820, Moore, *Digest*, VI, pp. 971-972.

⁷² As, for example, the Treaty between Germany and Colombia of 1892, quoted in the *Henriquez Case*: "The German Government will not attempt to hold the Colombian Government responsible unless there is want of due diligence on the part of the Colombian authorities or their agents, for the injuries, vexations, or exactions, occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government," Ralston, *Venezuelan Arbitrations*, p. 900. See similarly, Article III of the Special Claims Commission between the United States and Mexico, September 8, 1923, quoted in note 68, *supra*.

⁷³ See the *Gelbtrunk Case*, *For. Rel.*, 1902, p. 873; *Iloilo Case*, American and British Claims Arbitration Tribunal, November 19, 1925, *A. J.*, XX, p. 383; *Hopkins Case*, General Claims Commission, U. S. and Mexico, March 31, 1926, Sec. 11; *Home Insurance Co. Case*, *ibid.*, Sec. 17; Mr. Adey to Mr. Wilson, November 7, 1911, *For. Rel.*, 1912, pp. 946-947, quoted in Hyde, *International Law*, I, pp. 539-540.

⁷⁴ Ralston, *Venezuelan Arbitrations*, p. 559. See Goebel, in *A. J.*, VIII, p. 817; and *contra*, Bar, *loc. cit.*, p. 476.

⁷⁵ Borchard, *Diplomatic Protection*, p. 231, note 7. "If, in this respect, she does all in her power, and all that can be accomplished by means of her resources, it can be said that she fulfills the whole of her duties," *Prats Case*, Moore, *Arbitrations*, pp. 2896-2897.

Nevertheless, factors have at times been present which enabled the tribunal to convict the parent state of negligence. In the *Santa Clara Estates Co. Case*, it was argued that Venezuela had been negligent because she had permitted the revolution to continue for a year's time;⁷⁶ and, in another case, in which Venezuela was again concerned, because she had allowed a "handful of men" to keep control for six months.⁷⁷ Among other reasons why she was held responsible in the *Wenzel Case* was the fact that "a fort near the mouth of the Orinoco was held against the Venezuelan Government as late as January, 1872, by a 'Blue' officer and his wife with two old fashioned smoothbore guns equally dangerous at both ends."⁷⁸ Finally, the grant of amnesty to insurgents, or the combination of the opposing forces, has sometimes been regarded as revealing the lack of a sufficient desire on the part of the government to repress the revolution.⁷⁹

"The highest interests of the state itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state," Hall, *International Law*, p. 274.

⁷⁶ The umpire, however, decided that "there was no undue delay on the part of the Government in the restoration of its power in the district under consideration, and that it was not through the weakness, inefficiency, or passivity of the Government that the Revolution of liberation remained in control for the time named, but rather through its inherent strength in men, materials and money and in certain assisting circumstances," Ralston, *Venezuelan Arbitrations*, pp. 397, 400.

⁷⁷ Moore, *Arbitrations*, pp. 1717-1720, *Case of the Venezuelan Steam Transportation Co.* In the *Poggioli Case*, the state "is obviously responsible for not using proper means to repress them," Ralston, *Venezuelan Arbitrations*, p. 869.

⁷⁸ *Ibid.*, pp. 592-593. In the *Van Dissel Case*, Venezuela was held not to be responsible, since the movement started from another state, and yet was suppressed within a month, *ibid.*, p. 573. See Mr. Sherman to Mr. Dupuy de Lome, Moore, *Digest*, VI, p. 969; Mr. Olney to Mr. Terrell, *ibid.*, VI, p. 965.

⁷⁹ There is some uncertainty as to the effect of granting amnesty to, or the appointing to office of, former insurgents. In the *Montijo Case*, it was held that "the grantor of an amnesty assumes as his own the liabilities previously incurred by the objects of his pardon," Moore, *Arbitrations*, p. 1438. Similarly, in the *Case of Cotesworth and Powell*, "The amnesty laws of the state took away from the claimants all appellate recourse, and all means of redress before the authorities at Bolivar," *ibid.*, p. 2085. See also the *Case of Bovallins and Hedlund*, Ralston, *Venezuelan Arbitrations*, pp. 952-953. But it was pointed out in the *Divine Case*, Moore, *Arbitrations*, p. 2981, that the United States granted amnesty to the Confederates without thereby rendering herself responsible for their acts. Mr. Hyde suggests a distinction between public acts, incidental to the conflict, and acts of a private nature, having an internationally illegal character, *International Law*, I, pp. 542-543. See Ralston, *Law and Procedure*, §§ 637-641; Decencière-Ferrandière, *Responsabilité*, pp. 124-125, 163; *Baldwin Case*, Lapradelle-Politis, *Recueil*, I, p. 166; Committee for Progressive Codification, *Responsibility*, p. 13; *McCord Case*, *For. Rel.*, 1888, II, p. 1373; Opinion of Taft, in the Great Britain and Costa Rica Arbitration, pp. 26-27.

As with the rule of due diligence, so also the correlative rule of local remedies may be upheld as valid in these cases. It is, however, true that there is little opportunity for its application. On the one hand, nations can not ordinarily be expected to have agencies of redress capable of handling the exceptional cases which arise out of civil war. On the other hand, claimant nations would be unwilling to believe that local agencies could dispose of such cases without prejudice. Consequently, there being no local remedies provided, such claims will usually be taken up through diplomatic channels. Local agencies of repair are, however, sometimes provided; and, if so, they must be employed before a pecuniary claim may be entered against the state through diplomatic machinery.⁸⁰ Thus, it may be possible to have access to a court of claims, or such tribunal regularly constituted; or local laws may provide that districts are liable for the services within their limits, thus making it possible to secure reparations through local courts and laws; or special legislation may provide for indemnification by the state, as an act of grace.⁸¹ Such provision is comparatively rare in the case of civil war damages; but, if it exists, the claimant must endeavor to secure relief thereby, before appealing for diplomatic interposition. If he is discriminated against, or circumstances show that it is impossible for him to remedy his injuries by such process, he may plead a denial of justice, and ask his own state to present his claim.⁸²

⁸⁰ Against acts resulting from belligerent conditions, states naturally have made less provision. Brusa, *loc. cit.*, p. 99; and see the statement of the German General Gundell, in the discussion over Article III of the IV Hague Convention of 1907: "Si dans ce cas les personnes lésées par suite d'une contravention au Règlement sur les lois et coutumes de la guerre sur terre ne pouvaient demander réparation au gouvernement, et qu'elles fussent obligées à se retourner contre l'officier ou le soldat coupable elles seraient dans le majorité des cas, destituées de la faculté d'obtenir l'indemnisation qui leur est leur due," *Actes et Documents, Deuxième Conférence*, III, p. 145.

As to the duty of seeking local redress, and of providing it, see Oppenheim, *International Law*, I, pp. 260-261; Schoen, *Haftung*, pp. 76-77; Brusa, *loc. cit.*, p. 134, Nos. 8 and 11; de Visscher, *Responsabilité*, p. 104; *Règlement de l'Institut*, September 10, 1900, *Annuaire*, XVIII, p. 256; Hyde, *International Law*, I, p. 540, note 2; Pradier-Fodéré, *Traité*, I, § 205; Breton, *Responsabilité*, p. 81.

⁸¹ "When a state remunerates its own citizens, it may anticipate a demand that resident aliens be given similar treatment," Hyde, *International Law*, I, p. 540, note 2, who cites Mr. Evarts to Mr. Langston, March 24, 1879, Moore, *Digest*, VI, p. 960; see also Oppenheim, *International Law*, I, p. 261; Article 7, Resolutions of the *Institut*, 1927, Appendix III, *infra*.

⁸² "Certainly before he can appeal to an international tribunal, the suit in court

§ 45. For the acts of the government itself, as distinguished from those of insurgents, the state is, of course, responsible if such acts are in contravention of its international obligations.⁸³ No special norm of responsibility is to be found for civil war damages, though the law which imposes duties may be different in time of war, thus affecting the establishment of liability. The principles above discussed, of governmental responsibility for acts of state agents, apply equally in time of civil war, with occasionally a different result because of the different laws under which those principles operate. The existence of a status of belligerency, whether formally recognized or not, often serves to bring into play a system under which certain acts internationally illegal in peace time become permissible. But, for acts of its agents which are internationally illegal, the state must still be held to account; and even for some of its measures which are permissible in such a period of emergency, it is required to make compensation.

A governmental agent may do injury which, under international law, will serve to fasten responsibility upon his state, in a great variety of ways. Thus, the *Institut de Droit International* considered the closing of a port without proper notification, or the

having long since terminated, he should be prepared to show some actual denial of justice with relation to the subject-matter of his appeal," *De Caro Case*, Ralston, *Venezuelan Arbitrations*, p. 819. "Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could be reasonably required in that behalf, she is to be held blameless; otherwise not," opinion of Mr. Little in the *de Brissot Case*, Moore, *Arbitrations*, p. 2968. See Mr. Sherman to Mr. Thompson, April 22, 1897, Moore, *Digest*, pp. 892-893; Mr. Fish to Mr. Foster, August 15, 1873, *ibid.*, VI, p. 974; Mr. Buck to Mr. Alzamora, September 3, 1888, *ibid.*, VI, p. 986; Mr. Frelinghuysen to Mr. Baker, April 18, 1884, Wharton, *Digest*, II, p. 581; Committee for Progressive Codification, *Responsibility*, p. 13; *McManus Claim, For. Rel.*, 1915, p. 867.

⁸³ "We do not, however, include in this category [of non-responsibility] loss of property sustained by foreigners through the action of the state as a result of requisition, expropriation, confiscation, spoliation, or on any other arbitrary proceedings. Whether in peace, in war, or in time of revolution, the State should be foremost in respecting and protecting the property of foreigners. . . . A state of war or revolution would in no way justify the violation of any of these rights, and a State failing in the duty, which it has contracted with regard to the international community, to afford safety and protection, would also incur international responsibility," Committee for Progressive Codification, *Responsibility*, p. 13. See Borchard, *Diplomatic Protection*, pp. 233-234; Strupp, in *31st Report, International Law Association*, p. 127; Breton, *Responsabilité*, Ch. II; Bevilacqua, *Direito publico internacional*, I, p. 223; Bar, *loc. cit.*, pp. 464-479 (1c); Rougier, *Guerres Civiles*, p. 467; Hyde, *International Law*, I, § 296; *Annuaire de l'Institut*, XVIII, pp. 47, 255 (1c); editorial comment in *R. D. I. P.*, II, p. 339; *Clunet*, 39, p. 675; *Isaac Harrington Case*, Laprédelle-Politis, *Recueil*, II, p. 155; *Ruden Case*, *ibid.*, II, p. 593.

retention of foreign ships, as illegal; and claims have often been made for losses due to embargoes.⁸⁴ With regard to these measures, as well as in the case of forced loans and bombardments, the question may arise whether they were a necessary part of the conduct of the war.⁸⁵ For unnecessary or wanton acts, such as pillage by soldiers, or personal mistreatment, which may be regarded as internationally illegal, the state may be held to account.⁸⁶

But the alien must bear in mind the general rule that he can expect no more, ordinarily, than the citizens of the state in which he resides; and he must therefore be prepared to endure with those citizens certain of the hazards which accompany war. This position has been taken by the Court of Claims as well as by the Department of State:

The Court of Claims, adopting the language of my predecessor, Mr. Seward, has decided it to be the law and usage of nations that one who takes up a residence in a foreign place and there suffers an injury to his property by reason of belligerent acts committed against that place by another foreign nation, must abide the chances of the country in which he chooses to reside; and his only chance, if any, is against the government of that country, in which his own sovereign will not interest himself. Such has been the doctrine and practice of the United States and of the great powers of Europe, and this Government cannot, therefore, intervene in behalf of Mr. Fougén, or of any citizen of the United States, under the same circumstances.⁸⁷

⁸⁴ *Annuaire de l'Institut*, XVIII, p. 255 (1b); Borchard, *Diplomatic Protection*, p. 234; Rougier, *Guerres Civiles*, p. 474.

"To close ports which are in the hands of revolutionaries by governmental decree or order is impossible under international law . . . for the palpable reason that it is no longer in control of them," *Compagnie Generale des Asphaltes Case*, Ralston, *Venezuelan Arbitrations*, pp. 336-337; and see *De Caro Case*, *ibid.*, p. 810; *Orinoco Asphalt Co.*, *ibid.*, p. 586; *Martini Case*, *ibid.*, pp. 842-843; *Case of the Franklin*, Moore, *Arbitrations*, p. 3783; *Labuan Case*, *ibid.*, p. 3791; Moore, *Digest*, VI, § 1035.

⁸⁵ See the statement in Moore, *Digest*, VI, p. 907, quoting Moore, *Arbitrations*, p. 4615; *Labuan Case*, *ibid.*, p. 3791; Moore, *Digest*, VI, § 1036, as to forced loans; and *ibid.*, §§ 1040-1043, as to bombardments.

⁸⁶ In the recent *Case of the Union Bridge Co.*, the British Government was held liable for the diversion of bridge materials in South Africa, American and British Claims Arbitration Tribunal, January 8, 1924, *A. J.*, XIX, p. 218. The United States objected to the action of Spanish military authorities in compelling American citizens to work in the building of forts, and to pay large sums for such construction, Mr. Fish to Mr. Mantilla, January 11, 1876, Moore, *Digest*, VI, p. 905. See case of *Andrew Moss*, *ibid.*, VI, p. 921; Mr. Fish to Mr. Williams July 29, 1874, *ibid.*, VI, p. 920; rules of the Spanish Treaty Claims Commission, *A. J.*, IV, p. 818. As to acts of soldiers, see p. 61, *supra*.

⁸⁷ Mr. Fish to Mr. Washburne, April 28, 1871, Moore, *Digest*, VI, p. 888.

This principle is generally accepted;⁸⁸ but it leaves open the question as to what acts are justifiable, under international law, as belligerent measures. Of course, if property in the path of war is destroyed in the course of fighting, the neutral need not expect to be indemnified.⁸⁹ Further, if the state, in its belligerent capacity, finds it necessary to destroy property as a matter of military exigency, or as a police measure, it will not usually be held to account for such procedure.⁹⁰ If the property is in the hands of rebels at the time of its destruction, it may be regarded as enemy property, for which no claim may be presented.⁹¹ Where, however, property has been appropriated to the use of the government, remuneration should be made. Such use of the property, provided it is fairly compensated for, may be regarded as legitimate.⁹²

⁸⁸ "An alien residing within the domain of a belligerent State is said to accept, like the nationals thereof, the hazards of war, and to possess no greater rights than they to demand compensation from the territorial sovereign," Hyde, *International Law*, I, p. 526. See Mr. Cass to Mr. Burns, April 26, 1858, Moore, *Digest*, VI, p. 885; Mr. Seward to Count Wydenbruck, November 16, 1865, *ibid.*, VI, p. 885; Mr. Fish to Mr. Niles, October 30, 1871, *ibid.*, VI, p. 888; *Castel's Case*, Moore, *Arbitrations*, p. 3710; summary from Hale's Report, *ibid.*, pp. 3677-3679.

⁸⁹ "The foreign residents, whose property unhappily chanced to stand in the field of those operations, have no ground of complaint against the United States which had no choice but to conduct them where the enemy was to be found," *Case of the Luxon Sugar Refining Co.*, American and British Claims Arbitration Tribunal, November 30, 1925, *A. J.*, XX, p. 391. Many cases illustrating this rule may be found in, among others, Moore, *Digest*, VI, § 1032, and Moore, *Arbitrations*, p. 3666 *et seq.*

⁹⁰ *Blumenkron's Case*, Moore, *Arbitrations*, p. 3669; *Sterling's Case*, *ibid.*, p. 3686; *Dr. Mengs' Case*, *ibid.*, p. 3689; *Jardel's Case*, *ibid.*, p. 3699; *Case of the Adams*, Moore, *Digest*, VI, p. 893.

"Persons domiciled in the Confederate States can not claim for damages sustained by them for the forcible manumission of their slaves by Federal troops," Mr. Seward to Mr. Mercier, November 8, 1862, *ibid.*, VI, p. 885.

"We are satisfied that the destruction was a matter of police entirely within the powers of the military government and quite justified by the circumstances," *Case of Parsons*, American and British Claims Arbitration Tribunal, November 30, 1925, *A. J.*, XX, p. 385. See also the American argument in the *Case of the Labuan*, Moore, *Arbitrations*, p. 3791.

⁹¹ "In international law there could be no question of the right of the Federal commanders to seize it as contraband of war whether they found it on rebel territory, or intercepted it on the way to the parties who were to furnish in return material aid in the form of sinews of war—arms or general supplies," Mr. Bayard to Mr. Muruaga, June 28, 1886, Moore, *Digest*, VI, p. 897. "All the claims for cotton destroyed in the enemy's country, with a single exception . . . were disallowed by the unanimous voice of the commissioners," Hale's Report, Moore, *Arbitrations*, p. 3682.

⁹² "The horses, wagons, etc., impressed by the government forces for use against the enemy or in the public service in general, although only a temporary use was intended, must be paid for, although destroyed or captured by the enemy. It is the seizure of private property for the public use and its loss or destruction while so employed, whether by the enemy or the government, that entitles the owner to payment,"

Neither mobs nor civil wars need be regarded—to summarize—as creating an especial status which would fix or deny responsibility for all cases included therein. *Force majeure*, as excusing responsibility, must be ruled out of consideration, except in so far as it may be fitted into the rule of due diligence. Certainly, it can not be accepted as including all riotous disturbances and all insurrections, and covering them with the cloak of its exemption. Nor, on the other hand, is it possible to assert that the state is always responsible in such cases. Damages due to mobs and civil wars can not be grouped; each case must be measured by the rule of due diligence, and of denial of justice sought. These rules are sufficiently comprehensive to cover all cases; and no extraordinary conception such as that of *force majeure* is needed to aid in ascertaining responsibility.⁹³

Case of Putegnât's Heirs, Moore, *Arbitrations*, p. 3720; and see numerous other such cases at *ibid.*, pp. 3714-3745; Mr. Blaine to Mr. Langston, July 1, 1881, Moore, *Digest*, VI, p. 894; *Case of the American Electric and Mfg. Co.*, Ralston, *Venezuelan Arbitrations*, p. 36; Borchard, *Diplomatic Protection*, p. 234.

⁹³ *Contra*, Committee for Progressive Codification, *Responsibility*, p. 12: "We do not share the opinion of those who deny that revolution is a case of *vis major*. . . . A state can not be held responsible for occurrences in a territory no longer under its authority or control, when a case of *vis major* prevents it from fulfilling its duties as protector." The American Institute of International Law, however, agrees, Project No. 15, *A. J.*, XX, Supplement, p. 328, as does also the European *Institut*, Resolutions of 1927, Article 7, Appendix III, *infra*.

CHAPTER VII

CONTRACTUAL CLAIMS

§ 46. The tremendous values which are involved in the contractual obligations assumed by states towards aliens, as well as the popular hue and cry concerning "concessions" and "dollar diplomacy," have produced a concentration of interest upon this particular class of claims, which has given birth to various ingenious theories concerning them; and the consequent confusion of thought with regard to contractual obligations is reflected in state practice. It is possibly true also that there has been a slower development in that portion of international law which pertains to contractual relationships.¹ The increasing entry of governments into business has further created perplexing new problems of differentiation in this field, between the government in its sovereign capacity and in its business capacity. Out of this confusion there has seemed to arise a distinction between the treatment of contractual and of other claims; and this attitude, manifest in many writers and in an apparently inconsistent practice, justifies a separate treatment of such cases, though, as will be seen, the application of the principles of state responsibility to matters related to contracts made by states remains the same.

Contractual obligations may be put into three classes: those be-

¹Mr. Hyde finds a parallel between the development of the position at present taken toward contractual cases under international law, and the history of express *assumpsit* in private law. "The requirement of the United States to-day that a breach of contract must constitute also a tort in order to be regarded as internationally illegal conduct and as furnishing just cause for interposition resembles the attitude of the early English judges respecting the remedial breach of a parol promise. The tendency to devise means for the obtaining of redress for something more than the harm suffered through the tortious conduct of the foreign State, and to enable the claimant to secure compensation for the loss of the thing promised, suggests the struggles of the sixteenth century," Hyde, *International Law*, I, p. 549, note 1.

Similarly, R. B. Clark: "a parallel evolution, from the enforcement of claims for private torts, through the enforcement of claims for breach of contract with a tortious element such as seizure of property, up to claims for pure breach of contract alone." *Proc. Am. Soc.*, 1910, pp. 157-160. He adds that while the right of a sovereign to redress tortious injuries against its citizens abroad has long been recognized, this is not true of contractual claims. As a matter of fact, both are subject to substantially the same rule of local redress.

tween nationals and aliens; those between state and state; and those between state and alien. Contracts between individuals of different states are handled under the rules of Private International Law; and, ordinarily, occasion no question as between states until local remedies have failed, in which case it is simply a denial of justice.² Contracts between states have only in recent years become matters of importance; and little can be said concerning them as yet. The obligations of this sort created since the war are so enormous as to involve the security of the debtor states; but it is not now possible to lay down precise rules of international law to meet such cases.³ It is with contracts made between states and aliens that international law and public opinion have thus far been most concerned; and to these the greater portion of this chapter must be devoted.

§ 47. Contractual cases are usually the result of contracts made with, or concessions granted to, aliens by a state. It has often been urged that such claims, as being the source of imperialistic aggres-

² "As the claim stands it is merely a dispute between a citizen of the United States and a citizen of Venezuela in regard to their respective rights under the terms of a certain contract. It has not the necessary basis for an international reclamation. The case is very different from one in which the Government itself has violated a contract to which it is a party." *La Guaira Electric Light and Power Co. Case*, Ralston, *Venezuelan Arbitrations*, p. 182. See Borchard, *Diplomatic Protection*, pp. 283-284.

Certain actions taken by a government may render impossible the execution of a contract between individuals. Thus it was argued before the General Claims Commission, United States and Mexico, in the *Cargill Lumber Co. Case* now pending, that rights acquired by such a contract had been invaded by individuals, whether on their own initiative or under orders from local authorities, and that efforts to secure redress locally had proved futile; and that a Presidential decree, under authority of Art. 27 of the Mexican Constitution of 1917, had nullified the contract between individuals. The Mexican Government, being no party to the contract, could not be held to responsibility under any rules pertaining to contracts, but it could be called to account for a denial of justice. Whether responsibility may be proved in such cases depends upon whether the government is guilty of an internationally illegal act. See *Cases of the Home Insurance Co.* before the same commission, March 31, 1926; Administrative Decision No. III (*War Risk Insurance Cases*), Mixed Claims Commission, U. S. and Germany; *Union Bridge Co.*, American and British Claims Arbitration Tribunal, *A. J.*, XIX, p. 215; *Kronprinzessin Cecile*, U. S. Supreme Court, *A. J.*, XI, p. 874.

³ "No positive rule of International Law has ever yet been made dealing specially with the question of inter-state debts." Sir John Fischer Williams, "International Law and International Financial Obligations," *Biblioteca Visseriana*, II, p. 5.

No effort is made to discuss this problem. The reader is referred to the above article, which is practically the only investigation made in this new field. The current controversy over inter-allied debts will doubtless contribute much to its solution. The question seems to reduce itself to the play between the right of existence and the rule *pacta sunt servanda*, with its attendant obligation. Ancillary considerations, such as the political elements which entered into the transaction, make the question very difficult of solution at present.

sion and the basis of "dollar diplomacy," should be put upon a different footing from other international claims, and that diplomatic support for them should be refused by the claimant's state. These arguments are so concisely stated by Mr. Hershey as to serve conveniently in quotation:

It is urged that hazardous loans and investments should be discouraged; that those making them usually do so with a full knowledge of the risks incurred and in the expectation of exceptionally large returns; that the natural penalty of a failure on the part of a State to fulfill its obligations is loss of credit; that foreigners can not hope to be preferred to native creditors; that coercive measures for the collection of bad debts are never or seldom employed except against weak states and are likely to be employed as a pretext for aggression or conquest; and that "it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it."⁴

On the other hand, it is argued that, since the sovereign can not be sued without his own consent, the public faith of the state is peculiarly involved; that the only method by which redress can be obtained under such circumstances is diplomatic interposition; that the public debt has always been considered inviolable, even in time of war; and that since states are equally sovereign, the injured state has as much right to enforce payment as has the respondent state to refuse it.⁵

It is to be observed that these arguments are not so much directed against the *right* of the state to protect its citizens abroad from injustice in connection with contracts, as against the *expediency* of intervening in their behalf, or the *procedure* to be followed in presenting or enforcing the claim.⁶ The right of a state to interpose on account of internationally illegal conduct, through which its citizens sustain injury, has never been surrendered, nor denied, where the proper procedure has been followed. The United States has emphatically asserted its right:

⁴ Hershey, *Essentials*, p. 168. See, for other summaries, Borchard, *Diplomatic Protection*, p. 285; Basdevant, in *R. D. I. P.*, XI, pp. 362-458; *Proc. Am. Soc.*, IV, p. 181; and comments upon the Drago Note, in *R. D. I. L. C.*, 35 (2nd Ser., 5), p. 597.

⁵ Continuing the presentation made by Hershey, cited in previous note.

⁶ "The question is here not so much one of responsibility (for the responsibility of a State is conceded in these cases) as the means by which the claims may be enforced." Hershey, *Essentials*, p. 167. See also Williams, *loc. cit.*, pp. 10-48; Fauchille, *Traité*, I, pp. 597-603.

The United States believe it to be their duty, and they mean to execute it, to watch over the persons and property of their citizens visiting foreign countries, and to intervene for their protection when such action is justified by existing circumstances and by the law of nations. . . . These contracts with their citizens have a national importance. They affect not ordinary interests merely, but questions of great value, political, commercial and social, and the United States are fully justified by the considerations already adverted to in taking care that they are not wantonly violated.⁷

Arbitral commissions, acting under treaties which give them jurisdiction over all claims arising out of injury to citizens, have not hesitated to include contractual claims within their competence, on the theory that such has been the design of the contracting parties.⁸

When an alien has suffered through the failure to execute a contract as illegal. It must still be borne in mind that, even though the state until it can be shown that its own act in violation of the terms of the contract constitutes an international delict; and it now becomes necessary to ascertain whether practice establishes such an act as illegal. It must still be borne in mind that, even though the conduct of the state toward an alien is proved to be illegal, resort must be had first to local means of redress, where they exist, before diplomatic interposition becomes justifiable.

§ 48. Some statements made by officials of the United States have led to the belief that there is, in her practice, a difference in

⁷ Mr. Cass to Mr. Lamar, July 25, 1858, Moore, *Digest*, VI, p. 723. On October 12, 1889, Mr. Blaine telegraphed to the American Minister at Lisbon that the United States would "demand and expect the restoration of property or indemnity for losses inflicted by Portuguese Government at the time of threatened forfeiture," *Delagoa Bay Railway Case*, *ibid.*, VI, p. 728. Note also the attitude taken in the *El Triunfo Case*, *ibid.*, VI, p. 732, *For. Rel.*, 1902, p. 839.

"The learned Mexican Agent has failed to draw a distinction between an administrative *policy* and a *right*. While it has been the policy of the United States not to intervene in the settlement of contract claims, no case has been produced, nor is it apprehended one can or will be produced, where the United States has taken the position it had no *right* to intervene." General Claims Commission, U. S. and Mexico, *Case of Wm. A. Parker*, Reply Brief for Claimant, p. 8.

⁸ "A rule that contract claims are cognizable only in case denial of justice or any other form of governmental responsibility is involved is not in them [decisions of Mexican Claims Commission of 1868] nor can a general rule be discovered according to which mere non-performance of contractual obligations by a government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the non-performance is accompanied by some feature of the public capacity of the government as an authority." *Illinois Central Railway Co. Case*, General Claims Commission, U. S. and Mexico, March 31, 1926, Sec. 4; and *passim*. See Moore, *Arbitrations*, p. 3426 (Commission of 1839, U. S. and Mexico); p. 3440 (Commission of 1849,

the treatment of contractual and other claims. This difference seems to reduce itself to one as between torts and contracts. We may cite, for example, an extract quoted by Secretary Buchanan:

It has been the practice of this Department to confine its official action in the recovery of indemnity from foreign governments to tortious acts committed under their authority against the persons and property of our citizens. In the case of violation of contract, the rule has been not to interfere, unless under very peculiar circumstances, and then only to instruct our diplomatic agents abroad to use their good offices in behalf of American citizens with the Governments to which they are accredited. The distinction between claims arising from torts and from contracts is, I believe, recognized by all nations, and the reasons for this distinction will readily occur to your own mind.⁹

It seems clear that the United States does not regard a mere breach of contract as in itself internationally illegal.¹⁰ Reiterated statements of this position are to be found in her diplomatic correspondence. Mr. Bayard asserted that

U. S. and Mexico); especially, p. 3466 (Commission of 1868, U. S. and Mexico); p. 3466 (*Dewitt Case*); Hyde, *International Law*, I, § 306; Ralston, *Law and Procedure*, § 93; Borchard, *Diplomatic Protection*, § 115, and p. 298; Borchard, in *Columbia Law Review*, XIII, p. 485, and especially p. 488, which cites English and European practice.

⁹ Mr. Buchanan to Mr. Ten Eyck, August 28, 1848, Moore, *Digest*, VI, pp. 708-709. Similarly, Mr. Fish: "Our long-settled policy and practice has been to decline the formal intervention of the government except in cases of wrong and injury to person and property, such as the common law denominates *torts* and regards as inflicted by force, and not the result of voluntary engagements or contracts," Mr. Fish to Mr. Muller, May 6, 1871, *ibid.*, VI, p. 710. See Mr. Bayard to Mr. Dorsheimer, January 25, 1886, *ibid.*, VI, pp. 716-717.

"While the United States most frequently intervenes in cases of wrong and injury to persons and property such as the common law denominates torts and regards as inflicted by force and not the results of voluntary engagements or contracts, it will also support the contractual claims of its citizens against foreign powers when the citizens holding such claims are denied a judicial remedy against it." R. F. Clarke, in *Proc. Am. Soc.*, IV, p. 142. See Hyde, *International Law*, I, p. 545; Hall, *International Law*, pp. 333-334; Borchard, *Diplomatic Protection*, p. 281, and in *Columbia Law Review*, XIII, p. 457; Phillimore, *Commentaries*, Pt. V, Ch. III.

¹⁰ "It may be doubted, however, whether the mere breach of a promise by a contracting State with respect to an alien is generally looked upon as amounting to internationally illegal conduct. Nor does the motive which impels such action appear to suffice to attach to it a lawless character which it would otherwise not possess. In the estimation of statesmen and jurists, international law is not regarded as denouncing the failure of a State to keep such a promise, until at least there has been a refusal either to adjudicate locally the claim arising from the breach, or, following an adjudication, to heed the adverse decision of a domestic court." Hyde, *International Law*, I, pp. 546-547. This is cited with approval in the *Cayuga Indian Claims*, American and British Claims Arbitration Tribunal, *A. J.*, XX, p. 592. See Borchard, *Diplomatic Protection*, pp. 286-287.

If the sovereign appealed to denies the validity of the claim or refuses its payment, the matter drops, since it is not consistent with the dignity of the United States to press, after such refusal or denial, a contractual claim for the repudiation of which, by the law of nations, there is no redress.¹¹

In practice, the United States has oftentimes offered merely her good offices in behalf of the claimant with a broken contract, and has not always been willing to grant even this much support.¹² Arbitral tribunals have refused awards where no other ground for complaint was exhibited than the failure to execute the contract.¹³ While European states have been more willing, perhaps, than the United States to intervene for the support of contractual claims, it will nevertheless be found that elements of greater importance than mere lack of fulfillment of the terms of the contract were brought into consideration.¹⁴

But the refusal to press a claim based upon a broken contract is not necessarily indicative of any difference in the treatment of such claims and claims arising from other types of injury. If, as above suggested, mere breach of contract does not of itself constitute internationally illegal conduct, no responsibility may be imputed to

¹¹ Mr. Bayard to Mr. Bispham, June 24, 1885, Moore, *Digest*, VI, p. 716. See also Mr. Blaine to Mr. Moffit, June 20, 1890, *ibid.*, VI, p. 717; *Landreau Case*, *ibid.*, VI, pp. 714-715; Mr. Fish to Mr. Shepard, March 19, 1872, *ibid.*, VI, p. 710; Mr. J. Q. Adams to Mr. Salmon, *ibid.*, VI, p. 708.

¹² "In cases founded upon contract, the practice of this Government is to confine itself to allowing its minister to exert his friendly good offices in commending the claim to the equitable consideration of the debtor without committing his own Government to any ulterior proceedings," Mr. Fish to Mr. Muller, May 16, 1871, Moore, *Digest*, VI, p. 710. See *Landreau Case*, *ibid.*, VI, p. 715; Mr. Bayard to Mr. Bispham, June 24, 1885, *ibid.*, VI, p. 716; Borchard, *Diplomatic Protection*, pp. 288-291; references given in Moore, *Digest*, VI, pp. 705-707.

"Good offices will be refused when the debt was of a speculative character or when it was incurred to aid the debtor government to make war on a country with which the United States was at peace." Mr. Seward to Messrs. Leavitt & Co., May 6, 1868, Moore, *Digest*, VI, p. 710.

¹³ *Studer Case*, American and British Claims Arbitrations Tribunal, March 19, 1925, A. J., XIX, p. 792, 794; *Hubbell's Case* (1871), Moore, *Arbitrations*, p. 3485; *Thore de Lespe's Case*, *ibid.*, p. 3466; *Case of Flanagan, Bradley, Clark & Co.* (1885), *ibid.*, p. 3566; *Case of the Tehuantepec Ship Canal Co.* (1868), *ibid.*, p. 3132; *La Guaira Light and Power Co.*, Ralston, *Venezuelan Arbitrations*, p. 182.

¹⁴ See the attitude taken by the United States toward the French desire to collect from Venezuela in 1881, Moore, *Digest*, VI, pp. 711-712; Borchard, *Diplomatic Protection*, p. 286, note 4; Hall, *International Law*, p. 334, note 1, quoting the famous statement of Palmerston in 1848; *Martini Case* (Italy), Ralston, *Venezuelan Arbitration*, p. 819; *Great Venezuelan Railroad* (Germany), *ibid.*, p. 632; Basdevant, in R. D. I. P., IV, p. 404.

the state until it fails to supply means of redress against itself and an opportunity thereby to obtain award of damages for cause. The rule of local redress is essential, since only through its operation may the state itself assume responsibility. The practice of the United States is given its correct interpretation by Mr. Hyde:

It has been seen that the propriety of interposition depends primarily upon a denial of justice by the foreign territorial sovereign, and secondarily, upon its failure to offer a means of redress for its own delinquency. Whenever States make adequate provision for the adjudication of contractual claims against them before domestic tribunals, as they frequently do, the latter requirement is wanting, and, howsoever the breach of contract is regarded, the situation merely affords an illustration of the general principle respecting the duty of a claimant to exhaust his local remedies.¹⁵

The Department of State has often demanded that local remedies be attempted before the interposition of the United States should be asked, and has then refused to support the claim if unaccompanied by denial of justice. Thus:

When the alleged debtor sovereign declares that his courts are open to the claim, this by itself is a ground for a refusal to interpose. Since the establishment of the Court of Claims, for instance, the United States remands all claims held abroad, as well as at home, to the action of that Court, and declines to accept for its executive department cognizance of matters which by its own system it assigns to the judiciary.¹⁶

¹⁵ Hyde, *International Law*, I, pp. 545-546.

¹⁶ Mr. Bayard to Mr. Bispham, June 24, 1885, Moore, *Digest*, VI, p. 715. "The United States has always refused to press the contractual claims of its citizens against foreign powers, unless it should appear that the citizens holding such claims were unduly discriminated against by the debtor government, or denied a judicial domestic remedy against it," Mr. Bayard to Mr. Hall, March 27, 1888, Moore, *Digest*, VI, p. 726. "The delay or denial of justice which it was desirable to remedy, was the same, whether it was for a wrong committed, or for a contract broken," Mr. Adams, with reference to the Spanish claims, 1819, *ibid.*, VI, p. 718. "You will therefore ascertain by proper inquiry whether or not the tribunals of Peru are open to claimants against the Government, and should you find that Mr. Sparrow can not avail himself of these means of redress it will be proper for you to present this claim to the authorities of Peru, with a view to its speedy adjustment and payment," Mr. Evarts to Mr. Gibbs, October 31, 1877, *ibid.*, VI, p. 720. See also Mr. Cass to Mr. Jerez, May 5, 1859, *ibid.*, VI, p. 724; Mr. Cass to Mr. Lamar, July 25, 1858, *ibid.*, VI, pp. 723-724; Mr. Bayard to Mr. Scott, June 23, 1887, *ibid.*, VI, p. 725; Mr. Hill to Mr. Russell, April 30, 1901, *ibid.*, VI, p. 733.

See, however, the statement of Mr. Clarke that the "rule of international law that local remedies must, as a rule, be exhausted is a rule of policy for the government to whom the application for redress is made," and that later practice has repudiated

Ample support is to be found in arbitral decisions for the rule that redress must be sought in domestic tribunals where they are provided.¹⁷

If local remedies are lacking or unavailing, interposition may be justified upon the ground of a denial of justice.¹⁸ When a state declines to offer a remedy, it puts itself outside the law. It is essential that the state should provide recourse against itself; and, as a matter of fact, most modern states make provision for this purpose.¹⁹ It may be that the courts established fail to function properly, or that discrimination is exercised against the alien, or that the court is corrupt, or that its decrees remain unexecuted, or that particular courts lack jurisdiction to award damages against the state.²⁰ Where such conditions as these are to be found, diplomatic interposition may be anticipated, and a claim of responsibility against the state within which they occurred, not because of breach of contract alone, but because the state which breaks the contract persists in declining to offer an effective remedy against itself in its own courts.

"the alleged claim of international law that resort for redress must first be had to the courts of the country." *Proc. Am. Soc.*, 1910, pp. 153, 160, 164.

¹⁷ "International commissions have frequently allowed claims based on the infraction of rights derived from contracts where the denial of justice was properly established." Moore, *Digest*, VI, p. 718, with citations.

¹⁸ "It is exclusively a matter between the claimant and the Mexican Government, apparently ready to receive her and consider her claim. It is a matter of debt, the creditor being a woman who has no claim whatever to make the United States her collector of debts," *Thore de Lespe's Case*, Moore, *Arbitrations*, p. 3466. *Case of Hayes* (1849), *ibid.*, p. 3456; *Mary Smith*, *ibid.*, p. 3456; *Kennedy and King*, *ibid.*, p. 3474; *Tehuantepec Ship Canal Co.*, *ibid.*, p. 3132. "That before reclamation can be successfully urged against Salvador in their behalf it must be shown that such citizens of the United States, having appealed to the courts of the Republic, have been denied justice by those courts. The general statement of international law as thus stated is not denied," *Salvador Commercial Co.*, *For. Rel.*, 1902, pp. 844-845. *Seuder and Brown Cases*, cited in note 13, p. 162, *supra*.

¹⁹ "Local Remedies are provided generally in foreign countries for the settlement of contract claims founded upon contracts with the Government or its agencies," *Claims Circular*, 1919, quoted in Hyde, *International Law*, I, p. 546, note 1. See Borchard, *Diplomatic Protection*, p. 285.

²⁰ Frequently various elements are combined. Thus, in the case of the *Salvador Commercial Company*: "That the courts did not acquire lawful jurisdiction to decree the state of bankruptcy of said company; that these facts were apparent and of record, and that the judge practised an undue delay and discrimination of justice in passing on the question of his jurisdiction; and that the act of the President of Salvador in annulling the concession by arbitrary executive decree . . . was wrongful in itself and constituted in its effects a veritable intervention in the legal controversy between the parties, unduly affecting and influencing the regular and ordinary processes of justice and rendering nugatory the lawful measures contemplated and initiated by the

Similarly, the state may be held responsible for confiscatory breaches of contracts. The United States has often intervened on this account;²¹ and such intervention has been justified as against a tortious, rather than against a contractual, injury. It has been said that the United States to-day requires "that a breach of contract must constitute also a tort in order to be regarded as internationally illegal conduct";²² and the diplomatic correspondence includes various statements in which this term of private law is introduced into the realm of international law.²³ In these cases, the basis for the claim is to be found in the fact that the circumstances accompanying the breach of the contract constitute in themselves internationally illegal conduct. It has been seen in earlier chapters that false imprisonment, or the lack of due diligence on the part of the state in preventing injurious acts by individuals, or

majority stockholders," *For. Rel.*, 1902, pp. 838-839. See the *Idler Case*, Moore, *Arbitrations*, pp. 3491, 3517.

As to discrimination: "It was there stated that, except where citizens holding such claims were unduly discriminated against by the debtor government, or were denied a judicial domestic remedy against it, the Government of the United States would refuse to press the claims," Mr. Bayard to Mr. Hall, September 11, 1888, Moore, *Digest*, VI, p. 727; and see Mr. Evarts to Mr. Langston, December 13, 1877, *ibid.*, VI, p. 724; Hyde, *International Law*, I, § 304; *Proc. Am. Soc.*, 1910, p. 164; Borchard, *Diplomatic Protection*, § 114; Mr. Neill to Mr. Hay, November 19, 1903, *For. Rel.*, 1904, p. 678.

²¹ With regard to the *Delagoa Bay Railway Co.*, "Secretary Blaine held that the seizure of the railway by the Portuguese Government was an act of confiscation; that the Portuguese company being without a remedy and having ceased practically to exist, the only resource was intervention," *For. Rel.*, 1902, p. 846. When Chile objected to a contractual claim, it was replied that "in point of fact, however, the construction company's claim is not, properly speaking, based upon the contract, but upon the conduct of the Chilean Government, amounting to a practical confiscation of its property," *For. Rel.*, 1895, I, p. 83. *Moses' Case*, Moore, *Arbitrations*, p. 3465; *Frear's Case*, *ibid.*, p. 3488; *Landreau's Case*, *ibid.*, p. 3471. Many other examples are found in Moore, *Digest*, VI, § 997. See Borchard, *Diplomatic Protection*, pp. 292-295; Hyde, *International Law*, I, § 304; Ralston, *Law and Procedure*, §§ 107-108.

²² Hyde, *International Law*, I, p. 549, note 1.

²³ Hyde, *International Law*, I, p. 549, note 1; Borchard, *Diplomatic Protection*, pp. 281-283, 292-295. "I observe . . . that in one part of your note to Dr. Seijas, you speak of the case as one of violation of contract, though you subsequently very properly rest the claim on tort. The case is indeed one of violation of contract, but it is not on the contract, for the purpose of obtaining either its fulfillment or damages for its non-fulfillment, that this Government now proceeds. The case is one of an arbitrary confiscation and spoliation," Mr. Bayard to Mr. Scott, August 12, 1887, Moore, *Digest*, VI, p. 725. See same to same, June 23, 1887, *ibid.* "Our long-settled policy and practice has been to decline the formal intervention of the Government except in cases of wrong and injury to person and property, such as the common law denominates *torts* and regards as inflicted by force, and not the result of voluntary engagements or contracts," Mr. Fish to Mr. Muller, May 16, 1871, *ibid.*, VI, p. 710.

other acts or omissions by the state, are in themselves regarded as delicts producing responsibility at once, though the propriety of diplomatic interposition depends upon the operation of local measures of redress. Similarly, practice seems to establish the rule that where the annulment of a contract by a state is accompanied by circumstances which render the action taken confiscatory in character, such action is to be regarded as internationally illegal. Such was the position taken by Mr. Olney in 1895:

the claim is not, properly speaking, based upon the contract, but upon conduct of the Chilean Government, amounting to a practical confiscation of its property.²⁴

Nevertheless, though such action produces responsibility at once, diplomatic interposition is not permissible until local remedies have been vainly attempted. Mr. Borchard says:

Fundamentally, it is the denial of justice which is the necessary condition for the interposition of a government on behalf of its citizens prejudiced by breach of contract. As a general rule, before a claim originating in a contract can come within the category of a denial of justice it must have been submitted to the courts for such judicial determination as is provided by local law or in the contract.²⁵

There would seem to be but slight objection, since practice permits responsibility to be urged for confiscatory breach of contract, in taking the further step of declaring all breaches of contract on

²⁴ Mr. Olney to Mr. Gana, June 28, 1895, Moore, *Digest*, VI, p. 729. "And you are furthermore instructed to represent to the Government of Venezuela that this Government will regard the forcible deprivation of this corporation of its property and franchises, without due process of law, and fair trial, as a tort, which cannot be sustained, and which this Government would consider a breach of comity between friendly governments and entitling the injured citizens to redress," Mr. Bayard to Mr. Scott, June 23, 1887, Moore, *Digest*, VI, p. 725. See also same to same, August 12, 1887, *ibid.*; *McMurdo (Delagoa Bay) Case*, summarized in Moore, *Digest*, VI, pp. 727-728; Memorandum of W. L. Penfield, concerning the *Salvador Commercial Company Case*, *For. Rel.*, 1902, p. 843; *Blondel Case*, Lapradelle-Politis, *Recueil*, II, p. 531.

While these cases have naturally been described as tortious, it seems to the writer to be unwise to transfer the term "tort" from private law into international law. The latter law has had its own independent development; and the circumstances of a case in which a sovereign state is one party to the contract are quite different from those in which two individuals are the parties. It would seem more fitting to describe these as cases of confiscatory breach of contract than as cases of tort.

²⁵ Borchard, *Diplomatic Protection*, pp. 281, 286; and see his article in the *Columbia Law Review*, XIII, p. 457. Hyde, *International Law*, I, p. 545.

the part of a state to be internationally illegal. Mr. Clarke argues:

It is difficult to see why, under international law, it should be held that intervention is proper to obtain damages for a seizure of a few barrels of flour or a coasting schooner worth a few thousand dollars, and at the same time such intervention is improper to obtain damages for hundreds of thousands of dollars invested in a plant valuable only in connection with a concession granted by the foreign country, and which, through the revocation of the franchise, has become valueless.²⁶

Arbitral opinions may be quoted which apparently assert that mere breach of contract is in itself an international delict, as, for illustration, the words of Commissioner Findlay:

A claim is none the less a claim because it originates in contract instead of in tort. The refusal to pay an honest claim is no less a wrong because it happens to arise from an obligation to pay money instead of originating in violence offered to persons or property. Torts, as a rule, present more aggravated cases of injustice and affect the citizen at points which more loudly call for redress than ordinary breaches of contract; but after all the difference lies in degree only.²⁷

The true test in these, as in all other cases in which the state responds for an injury done to an individual, is the provision which it makes for local redress. It is eminently desirable that states should be given the opportunity to repair, in their own courts, the damages caused by their actions; and it is even more desirable that states should offer redress against themselves, through judicial process, in such cases. The chief cause for diplomatic interposition in cases of breach of contract is the fact that the state does not permit judicial action against itself. An international obligation exists for each state to provide such redress; but it should be remembered that it is to be measured by an international standard. If a state fails in this duty of offering a forum against itself, the state whose

²⁶ In *Proc. Am. Soc.*, 1910, p. 156; see also p. 155, *ibid.*

²⁷ In the *Venezuelan Bond Cases*, Moore, *Arbitrations*, p. 3649; and see *Case of Beales, Noble, and Garrison*, *ibid.*, p. 3555; Rudloff, *Ralston, Venezuelan Arbitrations*, p. 188; *Oliva*, *ibid.*, p. 781.

"Fundamentally, however, there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrongdoer, is immediately responsible. The difference which is made in practice is in no sense obligatory; and it is open to governments to consider each case by itself and to act as seems well to them on its merits," Hall, *International Law*, p. 334. See Williams, in *Bib. Vis.*, II, p. 29.

national is left without a remedy has the unquestionable right to enforce its just claims by all the sanctions of international law, including intervention and, if necessary, the *ultima ratio*, war itself.

§ 49. The so-called "Calvo Clause,"²⁸ an application to contracts of the Calvo Doctrine already discussed, must be regarded as a superfluous statement of the rules upon which responsibility is founded. The difficulties which have arisen over it are due not so much to the bare statement of his doctrine, which is legitimate enough so far as it goes, but to the refusal of the Latin-American states to accept the international standard for the administration of justice, and to their attempts to define denial of justice in their own way.

The clause is found in contracts in various forms, always, however, attempting to limit the right of intervention in behalf of the alien, by an agreement on his part not to seek the aid of his state through diplomatic interposition. This agreement may be to the effect that the claimant will be satisfied with the action of the local courts;²⁹ or it may provide a special arbitration tribunal to pass upon disputes arising from the contract.³⁰ In more drastic efforts to avoid interposition, the clause may contain a promise under no circumstances whatever to seek diplomatic aid,³¹ or may even consider the aliens parties to the contract as citizens of the local state for purposes of the contract.³² The laws of a state may require

²⁸ See Ralston, *Law and Procedure*, §§ 70-88.

²⁹ In the *Rudloff Case*, the clause read: "The doubts and controversies that may arise on account of this contract shall be decided by the competent tribunals of the country in conformity with the laws and shall not give reason for any international reclamations," Ralston, *Venezuelan Arbitrations*, p. 183. See, similarly, the *Orinoco Steamship Co. Case*, *ibid.*, p. 86, Art. 14; *Turnbull et al.*, *ibid.*, p. 202, Art. XI; *Woodruff Case*, *ibid.*, p. 159; *Am. Electric and Mfg. Co.*, *ibid.*, p. 249.

³⁰ From the contract of the *Salvador Commercial Co.*: "In the event that some difficulty shall arise between the Government and the Company, the latter shall abandon any diplomatic intervention with reference to anything that may refer or relate to this contract, and both parties hereto bind themselves that any difference shall be decided by friendly arbitrators, each party to appoint one, and in case of difference of opinion the two to appoint a third to decide it, both parties binding themselves beforehand and without appeal, to accept the decisions rendered by the arbitrators," *For. Rel.*, 1902, p. 844. See *Case of Beales, Noble, and Garrison*, Moore, *Arbitrations*, p. 3550.

³¹ In the *Beales, Noble, and Garrison* contract, cited in the previous note, it was added that "this contract shall never, under any pretext or reason whatever, be cause for any international claims or demands." See *Cases of Kunhardt and Co.*, and of *Selwyn*, Ralston, *Venezuelan Arbitrations*, pp. 70, 323.

³² Art. XVIII of the contract between Mexico and the *N. A. Dredging Co.* offers an example of an especially severe promise extracted from the alien: "The contractor

the insertion of such a clause into contracts made with aliens before it is to be considered valid.⁸³

This effort to limit the alien contractor to such remedies as are provided by local law may be regarded as reasonable within certain limits. It is unquestionably the right of a sovereign state, within its territorial jurisdiction, to provide such machinery for the redress of injuries as it sees fit, upon the sole condition that such methods of redress measure up to the international standard of justice. It is true also that the alien who enters a state is required to submit himself to the laws of that state, and may not expect any better treatment than the citizens of that state receive. To this extent the insertion of the Calvo Clause into contracts made by a state with aliens is entirely within the rights of that state under the law of nations and, in view of the frequency with which the larger states have intervened in behalf of their citizens in Latin-American states, it is not surprising that the latter should resort to such emphatic statements, and improvise so many ingenious methods of evading the action of the intervening states.

When, however, such efforts are carried to the extent of extracting a promise from the concessionaire that he shall under no circumstances seek the diplomatic aid of his state, or when he is deprived for any purposes of his citizenship, the process raises many questions of profound importance. Several elements enter into the consideration of the problem. In the first place, the right of the state must surely be admitted to enter into any contract with an alien which it may care to make. It may entirely refuse to grant the contract, unless upon its own terms; and if the alien contractor

and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfillment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic of the Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract," General Claims Commission, U. S. and Mexico, Docket No. 1223, March 31, 1926, pp. 1-2. Other examples may be found in Moore, *Digest*, § 918; and see Borchard, *Diplomatic Protection*, Ch. IV, p. 792.

⁸³ See, as to the Mexican laws since 1917, Reply of Mexican Minister for Foreign Affairs, November 27, 1925, *Sen. Doc. No. 96, 69th Cong., 1st Sess.*, p. 4; and Note of the same, January 20, 1926, *ibid.*, p. 15. Borchard, *Diplomatic Protection*, p. 795.

accepts those terms, he is bound by them. Again, it would appear that the alien contractor is equally as free to agree that he will not ask the protection of his state except in such situations as would justify him in doing so under international law. Whether he may go so far as to surrender also the right of protection given to him by international law may be debatable; but there can be no doubt whatever of his complete incapacity to contract away his state's right to interpose in his behalf, should it care to do so.³⁴

It must be remembered that the contract derives its validity from the domestic law of the state, and has no authority as against international law. Consequently, the contract clause may be unenforceable because of the interposition of international law. The alien contractor is bound by his agreement, and may be forced to accept as a penalty for his failure to abide by it the loss of his contract. But if there has been a denial of justice, or other international illegality connected with the contract, he has a right by international law to call upon his own country for help, a right which is entirely distinct from any recourse which he may have under municipal law. The result is precisely what international law provides and expects. On the one hand, if there has been a mere breach of the contract on the part of the state, the alien has no claim under international law: he must avail himself of local remedies, as international law demands of him in any case, whether he has so contracted or not. On the other hand, if there has been a confiscatory breach of the contract by the state, or other procedure making local redress fruitless, or if the alien has sought local rem-

³⁴ This proposition is well established in the practice of states and of arbitral tribunals. "This government can not admit that its citizens can, merely by making contracts with foreign powers, or by other methods not amounting to an act of expatriation or a deliberate abandonment of American citizenship, destroy their dependence upon it or its obligation to protect them in case of a denial of justice," Mr. Bayard to Mr. Buck, February 15, 1888, Moore, *Digest*, VI, p. 294. See, to the same effect, Mr. Bayard to Mr. Hall, March 27, 1888, *ibid.*, VI, p. 295; Mr. Loomis to Mr. Hay, June 5, 1900 (*re* position of Germany), *ibid.*, VI, p. 300; Borchard, *Diplomatic Protection*, pp. 797-798, 805; Hyde, *International Law*, I, p. 552, note 1, and in *A. J.*, XXI, p. 298; Decenièvre-Ferrandièvre, *Responsabilité*, p. 170.

"The Commission holds that he may [promise to seek redress under Mexican law], but at the same time holds that he cannot deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage," General Claims Commission, U. S. and Mexico, *Case of N. A. Dredging Co.*, March 31, 1926, Sec. 11. Many arbitral decisions support this doctrine. See, for example, the statement of Judge Little in the *Case of Flanagan*, Bradley and Clark, Moore, *Arbitrations*, p. 3566; *Case of Rudloff*, Ralston, *Venezuelan Arbitrations*, p. 187, *For. Rel.*, 1888, Pt. I, p. 137.

edies in accordance with his contract but has failed to secure justice from them, he has rights of recourse to his own state, under international law, entirely independent of his contract. He may thus, as a result of asking the diplomatic aid of his state, have his contract annulled in accordance with its terms; but he may have also a claim for reparation based upon an internationally illegal act. Whether he has such a claim depends entirely upon the circumstances of the case. It is not the breach of the contract alone which justifies interposition, but the violation of international law, outside of and above both contract and domestic law. The sole effect of the clause, then, is to compel the alien to submit to the ordinary rules of international law for his protection; and this may be, at times, of importance to the contracting state.

The menace of the Calvo Clause lies in the purposeful effort of a state to decide unilaterally whether its local remedies are satisfactory, and thereby to fix for itself the measure of its international obligations. To admit it would therefore be to reduce international law to impotence. A state may not limit its own duties under international law by defining denial of justice, or limit the right which the alien's state possesses under the same law to interpose, under appropriate circumstances, in behalf of its nationals. Rights and duties established by international law may not be modified by the unilateral action of a state, much less by that of an individual. It is the duty of the state, as has been reiterated in numerous connections, to make redress for injuries suffered by aliens, if not through the orderly processes of adequate municipal machinery, then through pecuniary indemnity to the state of the injured alien. If, then, through any circumstances, it is apparent that local remedies are unavailing, the right to interpose becomes applicable at once, the Calvo Clause to the contrary notwithstanding. The only limitations upon this right are those established by the law of nations. A state is no more able, by writing words into its contracts or laws, to resist the force of international law than Canute was able, by his mere fiat, to stop the waves. The confiscatory breach of a contract, or a domestic limitation of denial of justice, or the absence of any method of recourse against the government, may deprive the individual of the means of redress which should be allowed him, and justify interposition on the part of his state.³⁵

³⁵ In the *Case of the Salvador Commercial Company*, the United States intervened

The Calvo Clause, except in so far as it repeats the usual rule of local redress, has been definitely rejected by international practice; and states do not hesitate to override it where an international illegality has been definitely established. Such has been the consistent attitude of the United States, illustrated in the following quotation from Secretary Bayard:

This Department does not concede that this clause constituted the Venezuelan courts the final arbiters of questions arising under the contract between the corporators and the Government of Venezuela, because, in the event of a denial of justice by such courts, this Department may under the rules of international law properly intervene.³⁶

More recently, Secretary Kellogg has asserted, in the controversy growing out of the Mexican Constitution of 1917, "the inability of an individual citizen of the United States to make any contract or declaration which would be binding upon his own government not to invoke its own right under the rules of international law to extend diplomatic protection."³⁷ European states apparently reject

against a Presidential decree "which was so timed as to be in effect an intervention in the pending litigation, thereby perverting the due and regular course of justice, rendering nugatory the lawful efforts of the majority of stockholders to regain control," *For. Rel.*, 1902, p. 843. Where the arbitral tribunal provided in the contract is suppressed by the government, an evident denial of justice exists, Moore, *Digest*, VI, pp. 301-302, with regard to the *Cases of Day and Garrison, McMurdo*, and *North and South American Construction Co.* For an example of limitation of the definition of denial of justice, see the Salvadorean law quoted in *For. Rel.*, 1902, p. 845; and see p. 111, *supra*. Mr. Bayard to Mr. Hall, March 27, 1888, Moore, *Digest*, VI, p. 295.

³⁶ Mr. Bayard to Mr. Scott, June 23, 1887, Moore, *Digest*, VI, p. 294. Mr. Bayard to Mr. Straus, June 28, 1888, *ibid.*, VI, p. 297; Mr. Partridge to Mr. Gresham, July 12, 1893, *ibid.*, VI, p. 298; Mr. Adee to Mr. Partridge, July 26, 1893, *ibid.*, VI, p. 299; Mr. Gresham to Mr. Crawford, September 4, 1893, *ibid.*, VI, p. 299-300; and instances given in Wharton, *Digest*, II, § 242. "Provisions similar to this contained in the laws of certain Spanish-American Governments, or in contracts between those Governments and citizens of the United States, have in recent years been several times set up as a bar to the intervention of this Government for the protection of the rights of its citizens. But the United States has uniformly refused to regard such provisions as annulling the relations existing between itself and its citizens, or as extinguishing the obligation to exert its good offices in their behalf in the event of the invasion of their rights," Mr. Bayard to Mr. Hall, March 7, 1888, *For. Rel.*, 1888, Pt. I, p. 137. See Hyde, *International Law*, I, p. 551; Borchard, *Diplomatic Protection*, pp. 796, 797, 809.

³⁷ Note of the Secretary of State to the Mexican Minister of Foreign Affairs, March, 1926, *Sen. Doc. No. 96, 69th Cong., 1st Sess.*, p. 35. The Mexican Foreign Minister admitted that "an individual may not compel the state of which he is a citizen to refrain from asserting a right that belongs to it," note of February 12, 1926, *ibid.*, p. 28. The controversy between the United States and Mexico is sum-

such limitations upon their right of action as emphatically as does the United States.³⁸ While arbitral tribunals have upon some occasions accepted the rule,³⁹ in the majority of cases they have denied its binding force.⁴⁰ Certainly, as Mr. Hyde says:

a State cannot with reason pronounce void a contract with an alien, and simultaneously demand that a question as to its interpretation or performance be adjusted according to provisions derived from the agreement itself.⁴¹

The most recent case involving the Calvo Clause is the decision

marized by C. W. Hackett, "The Mexican Revolution and the United States, 1910-1926," *World Peace Foundation Pamphlets*, Vol. IX, No. 5.

³⁸ Borchard, *Diplomatic Protection*, pp. 799, 809; Mr. Loomis to Mr. Hay, June 5, 1900, Moore, *Digest*, VI, p. 300; *R. D. I. P.*, IV, pp. 404-405, as to the attitude of Germany toward Brazil.

³⁹ The *Nitrate Rlwy. Co. Ltd. Case* is quoted in Ralston, *Law and Procedure*, § 86: "That the contracts provide a mode of settlement by arbitration for any differences or difficulties that may arise as to their legal validity which is inconsistent with any attempt to make them cause for an international claim on any pretext whatever," Commissioner Findlay, in *Case of Beales, Noble, and Garrison*, Moore, *Arbitrations*, pp. 3563-3564. Mr. Little dissented on the ground that the annulment of the contracts was tantamount to a refusal to arbitrate; and of this dissenting opinion Mr. Borchard remarks that it was the starting point for subsequent commissions' denying the validity of the clause, *Diplomatic Protection*, p. 801. In the *Flanagan Case* (Little again dissenting) Findlay again supported the clause, though he admitted that if the claimant had sought local redress, a difficult question would have been presented, *ibid.*, p. 3566. The decisions of Umpire Barge in the *Woodruff* (Ralston, *Venezuelan Arbitrations*, p. 60), *Rudloff* (*ibid.*, p. 193), *Orinoco Steamship Co.* (*ibid.*, p. 91) and *Turnbull* (*ibid.*, p. 200) *Cases* are too inconsistent to be of value as precedents. See Borchard, *op. cit.*, pp. 802-804, 810; Moore, *Digest*, VI, p. 307. Commissioner Wadsworth, in holding that the stipulations of the contract must be carried out before the Commission could take jurisdiction, was merely asserting the usual rule that local remedies must be exhausted, *Tehuantepec Ship Canal Co.*, Moore, *Arbitrations*, p. 3132.

⁴⁰ See following cases: *North and South American Construction Co.* (1892), Moore, *Arbitrations*, p. 2318; *Milligan* (1868), *ibid.*, p. 1643; *McMurdo* (1891), *ibid.*, p. 1865, and Moore, *Digest*, VI, p. 297; *Woodruff*, Ralston, *Venezuelan Arbitrations*, p. 160; *Rudloff*, *ibid.*, p. 193; *Kunhardt & Co.*, *ibid.*, p. 63; *Selwyn*, *ibid.*, p. 322; *American Electric and Mfg. Co.*, *ibid.*, p. 246; *Martini*, *ibid.*, pp. 819, 841.

That the claim is dismissed because of the claimant's failure to seek local redress does not necessarily mean support of the contractual clause. The claim would be dismissed under ordinary rules; since no occasion for diplomatic interposition has yet appeared. See *Cases of Tehuantepec Ship Canal Co.*, Moore, *Arbitrations*, p. 3133; *La Guaira Light and Power Co.*, Ralston, *Venezuelan Arbitrations*, p. 183; *N. A. Dredging Co.*, General Claims Commission, U. S. and Mexico, Docket No. 1223, March 31, 1926; *Home Insurance Co.*, *ibid.*, Docket No. 73, Sec. 15. Lapradelle-Politis, *Recueil*, II, p. 529, note 1, cites two cases in which claims were rejected because of a contract clause, and remarked that it would to-day be regarded as null.

⁴¹ Hyde, *International Law*, I, p. 552, with citations in note 1. "The Government of Salvador, having violated the agreement, can not appeal to that agreement in support of its own wrong. It can not plead the contract in bar of intervention after

of the General Claims Commission, in the case of the *North American Dredging Co. v. the United Mexican States*⁴² in which a carefully considered study of the validity of the Calvo Clause is made. Fully sensible of the importance of a decision respecting the Calvo Clause, the Commission asserted at the outset that it "does not feel impressed by arguments either in favor of or in opposition to the Calvo Clause, in so far as these arguments go to extremes." Such a clause can not be sustained to its full length because of its contractual nature, nor, on the other hand, be separated as if it were an accidental postscript. The contested provision, it was asserted, "is part of a contract and must be upheld unless it be repugnant to a recognized rule of international law." After emphasizing as free from any limitation the sovereign right of a nation to protect its citizens abroad, the Commission asks whether the alien may lawfully promise to seek redress through Mexican tribunals, and replies:

The Commission holds that he may, but at the same time holds that he cannot deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage.

The purpose of such a contract is not to destroy the right to protection, but to prevent abuses of it:

The purpose of such a contract is to draw a reasonable and practical line between Mexico's sovereign right of jurisdiction within its own territory, on the one hand, and the sovereign right of protection of the government of an alien whose person or property is within such territory, on the other hand.

The claimant agreed to be governed by such laws as Mexico provided for her own citizens, but this could not deprive him of his American citizenship, or of his "undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or

having itself repudiated the contract by which arbitration was provided as a remedy," *Salvador Commercial Co. Case, For. Rel.*, 1902, p. 844.

⁴² General Claims Commission, U. S. and Mexico, Docket No. 1223. A similar situation is discussed in several cases before the Mixed Arbitral Tribunals under the Treaty of Versailles. See, for these, *T. A. M.*, II (1923), p. 401; V (1926), pp. 410, 887, 907.

delay of justice as that term is used in international law. In such a case, the claimant's complaint would be not that his contract was violated but that he had been denied justice"—an internationally illegal act. Since the claimant had disregarded utterly his promise and never sought any redress from local authorities, the claim was dismissed.⁴³ The Commission remarked, in conclusion, that it was impossible to announce an all-embracing formula to determine the validity of the Calvo Clause, and that each case would have to be decided upon its merits; but

Whenever such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizens whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void.

To summarize: in so far as the Calvo Clause demands resort to local remedies for breach of contract, it is legitimate, but superfluous; for that rule is clearly stated and thoroughly established in international law. In so far as the clause attempts to forbid interposition under any circumstances, whether by a promise to that effect, or by regarding the alien as a citizen for the purposes of the contract, or by a unilateral definition of denial of justice, or otherwise, it is illegal and futile; for international law clearly states the right to interpose in case of a denial of justice.⁴⁴ The Calvo Clause has had little effect upon international law,⁴⁵ though

⁴³ The opinion has been criticized upon the ground of a lack of accord with Article V of the treaty under which it was submitted. See the editorial comment by E. M. Borchard in *A. J.*, XX, pp. 538-540; and the discussion by C. C. Hyde, *ibid.*, XXI, pp. 298-303. Aside from this technical point, the opinion seems to offer the most complete exposition of the Calvo Clause in contracts which has yet been made. Attention should be called to the concurring opinion of Parker, which is more explicit in its statement of the grounds of interposition. The contract clause, he agrees, "does not prevent claimant from requesting its Government to intervene in its behalf diplomatically or otherwise to secure redress for any wrong which it may heretofore have suffered or may hereafter suffer at the hands of the Government of Mexico resulting from a denial of justice, or any other violation by Mexico of any right which claimant is entitled to enjoy under the rules and principles of international law, whether such violation grows out of this contract or otherwise."

⁴⁴ "These states do generally though not always, admit the rule that where there is a denial of justice, recourse to diplomatic interposition is permissible," Borchard, *Diplomatic Protection*, p. 793. But they attempt to hide behind their own definition of denial of justice. It must be repeated that this is established by international law, and the state must measure up to that standard. See *Rudloff Case*, Ralston, *Venezuelan Arbitrations*, p. 187; Borchard, in *Proc. Am. Soc.*, 1910, p. 61.

⁴⁵ Hyde, *International Law*, § 305; Borchard, *Diplomatic Protection*, § 373; *Proc.*

it has been tenaciously adhered to by Latin-American states. However, it is doubtless true that, in their assertion of sovereign irresponsibility, these states have gone no farther to an extreme than have the powers which have intervened against them without awaiting the exhaustion of local remedies; and the controversy has been productive in the result that it has consolidated the fundamental rule of international law that local remedies must be attempted before diplomatic interposition.

§ 50. It has been contended that the public bonds issued by a state constitute an exceptional sort of obligation, to be distinguished from contractual, as well as from other, obligations of the state. The chief proponent of this doctrine has been the eminent publicist, Dr. Drago, who enunciated it in a note to the Argentinian minister at Washington, in 1902.⁴⁶ His reasons for justification of the proposed differentiation are summarized as follows:

first, because they are issued by the sovereign power of the State pursuant to legislation; secondly, because they are made payable to bearer; thirdly, because the purchaser buying the bonds in the open market acquires his right as obligee without other formality or relation with the debtor government; and fourthly, because when payment is for any reason suspended, there is no means of appeal by judicial action or otherwise to the debtor State, inasmuch as the suspension of payment occurs by virtue of the sovereign authority of the State manifested *jure imperii*.⁴⁷

Dr. Borchard strongly supports the distinction;⁴⁸ what

makes a public loan *sui generis* is that one of the contracting parties is a sovereign and therefore not subject to the ordinary rules of legal obligation and the other a non-resident alien, against whom the local territorial law is not enforceable. The debt is generally authorized and created by an act of legislation, which escapes all judicial review.

Neither these arguments nor the practice of states appears to offer

Am. Soc., 1910, p. 58; Ralston, *Law and Procedure*, pp. 58-72; Decencière-Ferrandière, *Responsabilité*, p. 170.

⁴⁶ Dr. Drago to Señor Merou, December 29, 1902, *For. Rel.*, 1903, pp. 1-5. See also Drago, "State Loans in their Relation to International Policy," *A. J.*, I, pp. 692-726; Scott, *Hague Peace Conferences*, I, p. 405; Hershey, "The Calvo and Drago Doctrines," *A. J.*, I, p. 26; Moulin, *La Doctrina de Drago* (Paris, 1908); G. W. Scott, "International Law and the Drago Doctrine," *North American Review*, 1906, p. 602; *R. D. I. L. C.*, 35, p. 597.

⁴⁷ Hyde, *International Law*, I, p. 560.

⁴⁸ Borchard, in *Columbia Law Review*, XIII, p. 477; and pages thereafter. See also Decencière-Ferrandière, *Responsabilité*, p. 179 *et seq.*

a sufficient ground for variation in the application of the rules for the establishment of responsibility. The controversy, which has ranged far beyond the limits of international jurisprudence, has produced a confusion in thought between the nature or source of the obligation, the liability therefor in international law, and the sanctions which the injured state may employ for the protection of such rights as it may have. The Drago Doctrine itself is not so much opposed to responsibility in principle for public bonds as to the use of armed force in collecting them when unpaid; and writers are usually concerned with the expediency or justice of *forcible* intervention, rather than with the legal right of diplomatic interposition based upon a recognized responsibility.

That the issuance of the bond is a sovereign act presents nothing novel.⁴⁹ It has been seen that the state is responsible for the acts of any of its agents; and the legislative body which issues or repudiates the bonds as truly engages the responsibility of the state, if its acts are internationally illegal, as does the tortious act of an administrative agent. The very fact that the legislature more nearly represents the ultimate authority within the state eliminates, in many cases, the possibility of local redress, and thereby calls into play diplomatic interposition.⁵⁰ That the bonds are transferable

⁴⁹ "It is not perceived how the process by which a State validly issues a bond or the functions of government exercised in order to accomplish that end, affect the rights of the obligee or of his State in case of default. Nor does the broad tenor of the agreement, or the method whereby an alien lawfully enters into the contractual relationship with the obligor, offer a solid basis of distinction. On principle, the failure of a debtor State to perform its promise with respect to a bond-holder—the bare nonfeasance—differs nowise from the failure to observe an agreement with a promisee expressed in any other form or concluded by any other process," Hyde, *International Law*, I, p. 560. "Fundamentally, however, there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrongdoer, is immediately responsible," Hall, *International Law*, p. 334. Ralston, commenting upon the remark of Umpire Paul "that it is a principle of international law that the internal debt of a state, classified as a public debt . . . can never be the subject of international claims," says that the "soundness of this view may well be doubted," *Law and Procedure*, § 98. Note also his comment upon the *Case of Russia v. Turkey* in § 92. See discussion by Williams, *loc. cit.*, *Bib. Visseriana*, II, p. 14 *et seq.*, especially at p. 22, where he rejects Drago's differentiation, as "a unilateral decision by one interested party which is to be binding upon the other."

⁵⁰ "The act of repudiation appears to differ sharply from the mere non-performance of the obligor's promise, as it places the State beyond the jurisdiction of its own courts, inasmuch as the sovereign acting as such does not permit the propriety of its conduct to be questioned by any domestic authority or according to any test. This fact renders any issue raised by an alien obligee or by his State, justiciable solely

and payable to bearer does not lessen the force of an obligation knowingly assumed upon this basis. And if it be argued that the alien consciously assumes a risk in the purchase of the bonds, it must be replied that he assumes a similar risk in his other enterprises, but international law has never on this account prohibited the support of his state.⁵¹ If there is any difference in the procedure by which claims arising from contracts and those arising from bonds are handled, it is only in that the right of diplomatic interposition is more clearly established in the latter case, since local remedies are there not so readily available.

Practice justifies the differentiation made by Drago no more than does theory. States have often been reluctant to go to the extent of armed violence for the collection of bond debts owed to their citizens; but they have never surrendered their right to do so. Of this feeling, the well-known statement of Palmerston may be taken as fairly representative:

. . . it is for the British Government entirely a question of discretion, and by no means a question of international right, whether they should or should not make this matter the subject of diplomatic negotiation. If the question is to be considered simply in its bearing on international right, there can be no doubt whatever of the perfect right which the government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the government of another country or any wrong which from such foreign government those subjects may have sustained.⁵²

before an international court. Under such circumstances interposition does not lack justification," Hyde, *International Law*, I, pp. 561-562. Westlake, commenting upon the Drago Doctrine, says that it would reduce international law to international morality, *R. D. I. L. C.*, 35, pp. 606-608; *Blondel Case*, Lapradelle-Politis, *Recueil*, II, p. 531 *et seq.*

⁵¹ See Borchard, *Diplomatic Protection*, pp. 308-309.

⁵² Quoted in Hall, *International Law*, p. 334, note 1. Palmerston goes on to say that the decision of the question of discretion turns entirely upon British and domestic considerations; but that, in order to discourage hazardous loans, the policy of the British government had been against making such claims international questions. "Great Britain's practice of non-interference is entirely a matter of policy and is not to be construed as the recognition of an international principle," says Borchard, who notes the interventions of Great Britain in Mexico in 1861, in Egypt in 1880, and in Venezuela in 1902. England has submitted such claims to arbitral tribunals, *Texas Bond Cases*, Moore, *Arbitrations*, p. 3591; *Florida Bond Cases*, *ibid.*, p. 2594; and see Lord John Russell to Sir C. L. Wyke, March 30, 1861, Moore, *Digest*, VI, p. 719; the Marquis of Salisbury to Señor Pividal, November 26, 1879, *ibid.*, VI, p. 724; Mr. Buchanan to Mr. Saunders, June 17, 1848, *ibid.*, VI, pp. 285-286; Ralston, *Law and Procedure*, § 94. For quotations from Pichon for France, and Roosevelt for the United States, see Williams, "Le Droit International et les obligations finan-

The reluctance of the United States to interpose in case of contractual claims has been noted; and while an even greater reluctance seems to exist to intervene for claims based upon bonds, it does not appear that she considers such intervention illegal. Action of this sort has been taken by her only in extreme circumstances, and frequently as the result of ulterior forces. Thus, her intervention in San Domingo was precipitated by the threat of French intervention in that country.⁵³ The fact, however, that she has been willing to present claims on occasion is sufficient evidence of her belief in the legality of such procedure.⁵⁴ The wording of The Hague Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, providing that *armed* force shall not be used unless there is a refusal to arbitrate, impliedly admits the right of interposition for the protection of the property of citizens invested in foreign bonds.⁵⁵ As a matter of fact, there have been a number of important interventions for this purpose;⁵⁶ and it is customary at the present time for indi-

cières," Académie de Droit International, *Recueil des Cours*, 1923, pp. 304-305, citing Scott, *Hague Peace Conferences*, I, p. 421; Decencière-Ferrandière, *Responsabilité*, pp. 180-181.

⁵³ The circumstances which produced this action, resulting in financial control by the United States over San Domingo, are summarized in the Message of the President to the Senate, February 15, 1905, Moore *Digest*, VI, pp. 734-738. See, as to the effect of the Monroe Doctrine, Fauchille, *Traité*, I, p. 638, and note 2; Borchard, *Diplomatic Protection*, § 125.

⁵⁴ As to the Venezuelan claims, see Moore, *Digest*, VI, pp. 711-712 and § 967; as to Haiti, *ibid.*, VI, p. 722, p. 729. *Colombian Bond Case*, Moore, *Arbitrations*, p. 3612; *Overdue Mexican Coupons*, *ibid.*, p. 3616; *Jarvis Case*, Ralston, *Venezuelan Arbitrations*, p. 145. On the American attitude, see Instructions to the American Delegates to The Second Hague Conference, *For. Rel.*, 1907, II, pp. 1128, 1133; Porter's speech of July 16, 1907, *Actes et Documents, Deuxième Conférence*, II, p. 229.

⁵⁵ Scott, *Hague Conventions and Declarations of 1899 and 1907* (New York, 1915), p. 89. "While this language restricts the use of armed force to the occasions specified, it is significant as a declaration that the employment of such means of obtaining justice may not be improper when the obligor State refuses to arbitrate, or prevents recourse to arbitration, or fails to submit to an award," Hyde, *International Law*, I, p. 565.

⁵⁶ As in Egypt, Greece, Turkey, Venezuela. In many cases, intervention has resulted in the establishment of financial controls over the debtor country. For a thorough discussion of the collective intervention in Venezuela, see Basdevant, "L'action coercitive anglo-germano-italienne contre le Venezuela en 1902-1903," in *R. D. I. P.*, XI, pp. 363-458. As to Cuba, San Domingo, and Haiti, see Hyde, *International Law*, I, §§ 19, 21, 22. See also Borchard, *Diplomatic Protection*, § 121; Fauchille, *Traité*, I, p. 567.

viduals who propose to lend money to foreign states to ask first the approval of their own foreign office.⁵⁷

Few bond cases have been submitted to arbitral tribunals; and their decisions are of little assistance. In some of the early cases, the Court refused to assume jurisdiction.⁵⁸ The decision in one of these, the *Colombian Bonds Case*, was severely attacked by Commissioner Little in the subsequent *Case of the Venezuelan Bonds*.⁵⁹ In several other cases the tribunal has taken jurisdiction and rendered decisions, some of which required payment⁶⁰ by the debtor state. The decision of The Hague Court in the case of the Preferential Claims of Germany, Great Britain, and Italy against Venezuela apparently not only approves a right to intervene, but gives preference to those state which employ force.

As in the case of contracts, a mere failure to execute—in this case, a failure to pay upon the bonds—does not in itself constitute an international illegality. But since the method by which the

⁵⁷ See Higgins' note to Hall, *International Law*, p. 336; "The Negotiation of External Loans with Foreign Governments," Hyde, *A. J.*, XVI (1922), p. 523; Williams, *loc. cit.*, *Bib. Visseriana*, II, p. 1; Borchard, *Diplomatic Protection*, p. 327, note 1. According to Secretary Knox: "... a leading Government should deter its nationals from making loans not of a sufficiently broad purpose to secure the approval of said Government in consultation with the other interested Powers." *For. Rel.*, 1912, p. 108. "The Council of Foreign Bondholders cannot consider any proposal unless submitted to and approved by the British Foreign Office," *For. Rel.*, 1913, p. 562.

"The Department of State issued, on March 3, 1922, a public statement in which . . . it requested that American bankers contemplating making foreign loans should inform the Department of State with reference thereto, in order that the Department might advise the bankers as to whether there was or was not objection to any particular issue. . . . While thus nominally a request, the source from which it emanated was such that the request in fact became a command." J. F. Dulles, "Our Foreign Loan Policy," in *Foreign Affairs*, October, 1926, p. 33.

⁵⁸ "The Government of the United States, like that of Great Britain, has not laid down or acted upon the principle that a citizen, who holds an interest in the public debt of a foreign country, and who in common with the other shareholders in that debt is unable to obtain payment of what is due him, is entitled as of right to the same support in recovering it as he would be in a case where he has suffered from a direct act of injustice or violence," Sir Frederick Bruce, in the *Colombian Bond Cases* (1857), Moore, *Arbitrations*, p. 3615. See also *Cases of Overdue Mexican Bonds* (1868) *ibid.*, p. 3616; *Widman* (1875), *ibid.*, p. 3467; *Texas Bonds* (1853), *ibid.*, p. 3591; *Florida Bonds* (1853), *ibid.*, p. 3594; *Ballistini*, Ralston, *Venezuelan Arbitrations*, p. 505; *Treadwell*, *ibid.*, p. 3469; *Chase*, *ibid.*, p. 3469; Ralston, *Law and Procedure*, §§ 94-103.

⁵⁹ *Venezuelan Bond Cases*, Moore, *Arbitrations*, p. 3616.

⁶⁰ *Compagnie Générale des Eaux de Caracas*, Ralston, *Venezuelan Arbitrations*, p. 275; *Boccardo*, *ibid.*, note (not reported); *Jarvis*, *ibid.*, p. 145; *Canevaro Claim*, before The Hague Tribunal, *A. J.*, II, p. 746; *Colombian Bond Cases*, cited in previous note.

bonds are repudiated is usually a sovereign act, there are generally no local remedies to be found; and the non-payment, under such conditions, may usually be regarded, in the result, as equivalent to an international delict. If local remedies exist, they must be attempted; and they are sometimes to be found.⁶¹ But if local remedies are not provided offering adjudication against the state in the event of a breach of the contract, the contracting state is barred from denying the propriety of interposition; and the right follows to press the claim by all possible international sanctions, including war itself.⁶² Expediency may well dictate a less drastic course; and this nations have usually recognized. But policy and right should be clearly differentiated. Statesmen do not, apparently, consider that the gain justifies so much of effort.⁶³ Again, the debtor state may be in so precarious a financial condition as to render payment impossible.⁶⁴ For such a condition, private law provides bankruptcy; but international law makes no provision for such a contingency; and states must be left, at their own discretion, to take it into consideration if a valid claim to such a status may be maintained.

⁶¹ "The fact is that the right to sue on bonds issued by States is generally allowed. Action in contract to recover principal or interest, due and unpaid, may be brought on the United States bonds in the Court of Claims," Scott, in *A. J.*, II, p. 91, quoted by Hyde, *International Law*, p. 561, who cites the statutes.

⁶² See especially the arguments of Williams, *loc. cit.*, *Bib. Visseriana*, II, pp. 9-11, 60. Also, *Proc. Am. Soc.*, 1910, pp. 154, 156; Hershey, *Essentials*, p. 162; Hall, *International Law*, p. 281; Nielsen's *Report*, p. 207; Rivier, *Principes*, I, Sec. 20, p. 272. This position is apparently sanctioned by The Hague Convention for the Limitation of the Employment of Force for the Recovery of Contract Debts; and by the decision of The Hague Court in the case of the Preferential Claims against Venezuela.

⁶³ See the note of Palmerston, quoted in Hall, *International Law*, p. 335, note.

⁶⁴ Mr. Hyde strongly denies such a plea: "As the defaulting state is generally ready to aver that, for reasons beyond its control, it has become insolvent, or at least unable to pay its indebtedness, any yielding to the plea that even the policy of the State of the obligee should depend upon the good faith of the obligor, offers opportunity and temptation to the dishonest debtor to escape the reasonable burden of its contract through false representations, the true nature of which it may become impossible to establish," *International Law*, I, p. 562, note 3. See also Rivier, *Principes*, I, p. 272; Fauchille, *Traité*, I, pp. 529-530. The doctrinal note to the *Venezuelan Bond Cases* in Lapradelle-Politis, *Recueil*, II, pp. 545-551, comes to practically the same conclusion, though it seems willing to take into consideration the ability of the state to pay.

CHAPTER VIII

THE MEASURE OF REPARATION

§ 51. When an internationally illegal act has been committed, it is incumbent upon the injuring state chargeable therewith to restore the situation exactly to its former state; or, if this is impossible, to substitute in some manner, and to such an extent, as will be considered to have repaired the injury. It is, said Umpire Parker, in the *Lusitania* Opinion:

a general rule of both the civil and the common law that every invasion of a private right imports an injury and that for every such injury the law gives a remedy. Speaking generally, that remedy must be commensurate with the injury received. It is variously expressed as 'compensation,' 'reparation,' 'indemnity,' 'recompense.' . . . The fundamental concept of 'damages' is satisfaction, reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.¹

It is usually true that responsibility in international law results in a remedial process: the duty of the respondent state is merely to restore the situation exactly as it was before being shattered by the illegal action, or, if there is no longer a possibility of this being done, to repair the damage by making compensation in some other manner.

This reparation, as has already been indicated, may be made in one of two ways, depending upon the circumstances, but not usually of free choice on the part of the injured state. In some contingencies, the state is permitted to offer domestic means through

¹ Mixed Claims Commission, U. S. and Germany, Opinion in the *Lusitania* Case, November 1, 1923, *Decisions and Opinions*, pp. 19, 25. See the decision of the Central American Court of Justice, in the *Case of Salvador v. Nicaragua*: "Fifth, That the Government of Nicaragua is under the obligation—availing itself of all possible means provided by international law—to reestablish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty," *A. J.*, XI, p. 730. See Grotius, *Rights of War and Peace*, II, XVII, 10; Yntema, "Treaties with Germany and Compensation for War Damages," *Columbia Law Review*, XXIV, p. 137; Hyde, *International Law*, I, §§ 298-299; *T. A. M.*, 1924, p. 224; Lapradelle-Politis, *Recueil*, II, p. 980.

which the individual or official who committed the injury shall himself repair the damage; in others, the respondent state must itself make reparation directly to the injured state. The former method has been sufficiently discussed. The state is responsible from the moment that it commits an internationally illegal act; and it is at once under the duty of putting into operation the local machinery through which reparation for the alien may be secured. The satisfactory operation of domestic remedial measures, providing for adjudication and award of damages, may be accepted as restoring integrity to the international system, and as discharging responsibility.² The provision and effective functioning of the machinery of local redress, if it measures up to the international standard, is, in fact, the usual method of procuring reparation.

§ 52. When, for one reason or another, local remedies are deemed to be insufficient, and the procedure of presenting a diplomatic claim is in order, the question of the form of reparation to be made by one state to another enters. Though there may be much uncertainty as to their application, the types of such reparation have become fixed with a fair degree of uniformity. In general, they may be divided into pecuniary and other methods, the former applying where a material damage has been done, and the others more apt to appear in cases in which there has been a failure of respect, or a positive insult to, another state.³ Both may be, and frequently are, demanded upon the same occasion.

Disavowal alone, while often offered or demanded, is seemingly not regarded as a sufficient reparation in any case.⁴ An apology,

² "But although the state cannot escape the obligation to make reparation for breaches of international law, this does not prevent its providing other means by which the injured party may obtain reparation, through municipal law. . . . If satisfaction is obtained from the person or officer guilty, the state's duty of reparation is fulfilled and to its fulfillment in this manner municipal law may lend a sanction," Wright, *Enforcement*, p. 94. "Ordinarily, this responsibility is discharged by a government rendering to a resident alien the same protection which it offers to its own citizen and bringing the perpetrators to trial and punishment," *Jonathan Brown v. U. S. and the Brulé Sioux*, 32 Ct. Cl. 433. See Hyde, *International Law*, I, pp. 493, 509; Hall, *International Law*, pp. 268-269; Oppenheim, *International Law*, I, p. 259.

³ See distinction between *Reparation* and *Genugthuung* made by Triepel, *Völkerrecht und Landesrecht*, pp. 334-335; and between *Reparation* and *Satisfaction* by Fauchille, *Traité*, I, p. 535. Also, Lapradelle-Politis, *Recueil*, II, p. 621; Decencière-Ferrandière, *Responsabilité*, pp. 249-250; Jess, *Politische Handlungen*, p. 83 *et seq.*; Article 10 of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

⁴ "The Court of Claims has held that a mere disavowal of the act is not sufficient to relieve the government from liability," Borchard, *Diplomatic Protection*, p. 191,

to say the least, would seem to be in order; and it will usually accompany a disavowal.⁵ The apology may be more or less ceremonial; and it may be accompanied by other especial signs of regret or atonement.⁶ The offended state may accompany its demands for disavowal and apology with the requirement that her flag be formally saluted;⁷ or that the offending agent be punished, if local action has failed to secure this;⁸ and very frequently a demand for material reparation may be added. If the situation is such as to demand it, the passage of a law which would make impossible future repetitions of the situation in question may also be requested.⁹

citing *Straughan v. U. S.*, 1, Ct. Cl. 324. De Visscher says that disavowal always implies a recognition of liability, and is not sufficient unless the injured state is willing to be satisfied with it, *Responsabilité*, p. 119. Note the demand made by Marquis Rudini, through Baron Fava, after the New Orleans mob case of 1891: "Simple declaration, however friendly and cordial, cannot be considered sufficient satisfaction, which must consist of positive reparation," *For. Rel.*, 1891, p. 670.

⁵ "But at least a formal apology on the part of the delinquent will in every case be necessary," Oppenheim, *International Law*, I, p. 250. See the *Torrey Case*, in which the tribunal was guided by the willingness of the United States to accept an apology, *Ralston, Venezuelan Arbitrations*, p. 163; the *Trent Case*, Moore, *Digest*, VI, p. 771; the *Panther Case*, *R. D. I. P.*, XIII, p. 200.

⁶ When the ambassador of Peter the Great in England, Mattueof, was arrested there, it was necessary to send Lord Whitworth as a special ambassador, bearing with him an engrossed copy of the Act which would make it possible in the future to punish such acts, to make a solemn speech of apology. The Tsar had demanded the condign punishment of the guilty parties, Martens, *Causes Célèbres*, I, p. 73. See the *London Times*, July 30, 1908, for an account of the ceremony by which Persia apologized for surrounding the British Embassy with troops. Other such examples are given by Eagleton, in *A. J.*, XIX, pp. 296-298.

⁷ For instances of salute to the flag, see Eagleton, in *A. J.*, XIX, pp. 296, 302, 304, 308; the *Dillon Case*, in which the United States agreed to salute the French flag because she had issued a *subpoena duces tecum* to the French consul, Moore, *Digest*, V, p. 80; the Tampico incident between the United States and Mexico, *A. J.*, VIII, pp. 579-585; the mob riot at New Orleans in 1851, Moore, *Digest*, VI, p. 813. There seems to be no uniform rule as to the return of the salute, which was the point at issue in the Tampico affair, Hyde, *International Law*, II, p. 178; Schoen, *Haftung*, p. 134; Triepel, *Völkerrecht und Landesrecht*, p. 342; and see demands made of Greece, p. 187, *infra*.

⁸ Count Sebastiani to Mr. Rives, June 15, 1831, Moore, *Digest*, VI, p. 813; *Respublica v. Longchamps*, *ibid.*, I, p. 178. When the American vice-consul, Imbrie, was murdered in Persia, the United States demanded the execution of his slayers. "The death sentences were carried out after the Washington Government had insisted that the two men must receive the extreme penalty, despite a decision by the Persian Cabinet to commute their sentences," *N. Y. World*, November 4, 1925. See also Article 10 of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

⁹ After the attack upon Mattueof, England passed an act—the famous Act of Anne—providing punishment for attacks upon ambassadors in the future. See citation in note 6, *supra*. After the *McLeod Case*, the United States amended the Habeas Corpus Act, *Rev. Stat.*, Sec. 753, Moore, *Digest*, II, p. 30. Consider the demands made upon Serbia by Austria-Hungary in 1914.

§ 53. No better method of illustrating the methods and extent of the reparation to be made can be offered than the quotation of a few illustrative cases. As a result of the Boxer uprising in China, a joint note was presented to her, making the following demands, which were incorporated into a protocol:

China having recognized her responsibility, expressed her regrets, and manifested her desire to see an end put to the situation created by the disturbances referred to, the powers have decided to accede to her request on the irrevocable conditions enumerated below, which they deem indispensable to expiate the crimes committed and to prevent their recurrence:

I. (A) Dispatch to Berlin of an extraordinary mission, headed by an imperial Prince, to express the regrets of His Majesty the Emperor of China and of the Chinese Government, for the murder of His Excellency, the late Baron Ketteler, the German Minister;

(B) Erection on the place where the murder was committed of a commemorative monument suitable to the rank of the deceased, bearing an inscription in the Latin, German, and Chinese languages, expressing the regrets of the Emperor of China for the murder.

II. (A) The severest punishment in proportion to their crimes for the persons designated in the imperial decree of September 25, 1900, and for those whom the representatives of the powers shall subsequently designate.

(B) Suspension of all official examinations for five years in all the towns where foreigners have been massacred or subjected to cruel treatment.

III. Honorable reparation shall be made by the Chinese Government to the Japanese Government for the murder of Mr. Sugiyama, chancellor of the Japanese legation.

IV. An expiatory monument shall be erected by the Imperial Chinese Government in each of the foreign or international cemeteries which have been desecrated, and in which the graves have been destroyed.

V. Maintenance, under conditions to be settled between the powers, of the prohibition of the importation of arms, as well as of material used exclusively for the manufacture of arms and ammunition.

VI. Equitable indemnities for governments, societies, companies and private individuals, as well as for Chinese who have suffered during the late events in person or in property in consequence of their being in the service of foreigners. China shall adopt financial measures acceptable to the powers for the purpose of guaranteeing the payment of said indemnities and the interest and amortization of the loans.

VII. Right for each power to maintain a permanent guard for its legation and to put the legation in a defensible condition. Chinese shall not have the right to reside in this quarter.

The Taku and other forts which might impede free communication between Peking and the sea shall be razed. [This is apparently VIII.]

IX. Right of military occupation of certain points, to be determined by an understanding among the powers, for keeping open communication between the capital and the sea.

X. (A) The Chinese Government shall cause to be published during two years in all subprefectures an imperial decree embodying—

Perpetual prohibition, under pain of death, of membership in any anti-foreign society.

Enumeration of the punishments which shall have been inflicted on the guilty, together with the suspension of all official examinations in the towns where foreigners have been murdered or have been subjected to cruel treatment.

(B) An imperial decree shall be issued and published everywhere in the Empire, declaring that all governors-general, governors, and provincial or local officials shall be responsible for order in their respective jurisdictions, and that whenever fresh anti-foreign disturbances or any other treaty infractions occur, which are not forthwith suppressed and the guilty persons punished, they, the said officials, shall be immediately removed and forever prohibited from holding any office or honors.

XI. The Chinese Government will undertake to negotiate the amendments to the treaties of commerce and navigation considered useful by the powers and upon other subjects connected with commercial relations, with the object of facilitating them.

XII. The Chinese Government shall undertake to reform the office of foreign affairs and to modify the court ceremonial relative to the reception of foreign representatives in the manner which the powers shall indicate.¹⁰

On July 14, 1920, the French flag, displayed on the French embassy in Berlin, was torn down by a mob. By way of reparation, Germany advertised large rewards for the apprehension of the individual guilty of tearing down the flag, and punished him according to law. In addition, apologies were formally made at the embassy, the police officials responsible were discharged, and the flag was restored with military ceremonies by a detachment of 150 soldiers. The French were dissatisfied because the troops did not appear in parade dress, and because they sang "Deutschland über alles," as they marched away; and amends were made for

¹⁰ The whole affair is described in Moore, *Digest*, §§ 808-810. The above quotation is found on pp. 515-516. For the expiatory missions, *For. Rel.*, 1901, pp. 187, 384.

this, with the explanation that it was financially impossible to afford parade dress.¹¹

The most important recent illustration of the method of making reparation was produced by the murder of General Tellini in Greece, in August, 1923. He was an Italian, commissioned by the Conference of Ambassadors to assist in the delimitation of the frontier between Greece and Albania; and he was murdered from ambush, by unknown parties, in Greek territory. The Conference of Ambassadors, whose representative he was, set the following measures of redress as due from Greece:

(1) Apologies shall be presented by the highest Greek military authority to the diplomatic representatives at Athens of the three Allied Powers, whose delegates are members of the Delimitation Commission;

(2) A funeral service in honor of the victims shall be celebrated in the Catholic Cathedral at Athens in the presence of all members of the Greek Government;

(3) Vessels belonging to the fleets of the three Allied Powers, the Italian naval division leading, will arrive in the roadstead of Phaleron after eight o'clock in the morning of the funeral services;

After the vessels of the three Powers have anchored in the roadstead of Phaleron the Greek fleet will salute the Italian, British and French flags, with a salute of twenty-one guns for each flag;

The salute will be returned gun by gun by the Allied vessels immediately after the funeral services, during which the flags of the Greek fleet and of the three Allied Powers will be flown at half-mast;

(4) Military honors will be rendered by a Greek unit carrying its colors when the bodies of the victims are embarked at Prevesa;

(5) The Greek Government will give an undertaking to ensure the discovery and exemplary punishment of the guilty parties at the earliest possible moment;

(6) A special commission consisting of delegates of France, Great Britain, Italy and Japan, and presided over by the Japanese delegate, will supervise the preliminary investigation and enquiry undertaken by the Greek Government; this work must be carried out not later than September 27, 1923;

The Commission appointed by the Conference of Ambassadors will have full powers to take part in the execution of these measures and to require the Greek authorities to take all requisite steps for the preliminary investigation, examination of the accused, and enquiry;

¹¹ *R. D. I. P.*, XXVIII, pp. 517-524. Note also the demands made by Jugo-Slavia upon Bulgaria as a result of the attack upon Colonel Krastitch, *A. J.*, XIX, p. 299, *N. Y. Times*, November 5, 7, 1923.

The Greek Government will guarantee the safety of the commission in Greek territory. It will afford it all facilities in carrying out its work and will defray the expenditures thereby incurred.

The Conference of Ambassadors is forthwith inviting the Albanian Government to take all necessary measures. . . .

(7) The Greek Government will undertake to pay to the Italian Government in respect to the murder of its delegate, an indemnity, of which the total amount will be determined by the Permanent Court of International Justice at the Hague, acting by summary procedure. . . .¹²

For the payment of this indemnity, the Greek Government was required to deposit 50,000,000 Italian lire as security. On the basis of a preliminary report,¹³ not decisive in character, and without waiting for a final report, the Conference of Ambassadors "decides that as a penalty under this head [neglect in pursuing criminals], the Greek Government shall pay to the Italian Government a sum of 50,000,000 Italian lire." While the decision of the Conference of Ambassadors affords an excellent illustration of the methods by which reparation may be made, it is much to be doubted whether an impartial judicial decision would have held Greece liable to the exorbitant damages demanded by Italy.¹⁴

The above quotations illustrate the variety of methods by which

¹² *Official Journal*, League of Nations, 1923, pp. 1304-1305; Levermore, *Fourth Year Book of the League of Nations* (Brooklyn, 1924), pp. 260-278.

¹³ The investigating commission reported that "there are certainly several instances of negligence to be noted, but the facts hitherto ascertained are not sufficiently complete and decisive to enable the Commissioners to express an opinion as to whether the Greek Government should be held responsible for this negligence, or whether the negligence is the result of the defective organization of a Police Administration which has only rudimentary machinery at its disposal for criminal investigations. At present the Italian Commissioner—for reasons mainly of a psychological nature—inclines toward the first hypothesis, while the other three Commissioners incline toward the second," Levermore, *Fourth Year Book of the League of Nations*, p. 404.

¹⁴ One may doubt whether the position of General Tellini was such as to justify the exorbitant reparation received by Italy for his death. He was the representative of the Conference of Ambassadors, rather than of Italy; and, if his credentials were issued by Italy, commissioners are not entitled to diplomatic protection. It would be difficult to prove from international law that he was entitled to more protection than the average Italian citizen in Greece—for whom no such exorbitant an indemnity would have been asked. Again, the sum was specifically stated to be a penalty; but much opposition would be found to penal damages in international law. Greece pointed out that, though she had received no warning of danger, she had kept a special detachment on guard; and that the attack occurred in a wild country where protection was very difficult. Nor was any affront to Italy established by the evidence. Unless on the ground of not maintaining an efficient police system, it is not believed that such damages would have been awarded by a court. It is much to be regretted that the decision was taken from the hands of the Permanent Court.

reparation may be made, though they may all be summed up under the groups above suggested: apology, with which should be associated salute to the flag and military honors; punishment of offenders; security for the future; and indemnity. M. de Visscher suggests that the damages to be repaired are either material or moral; and that, for the former, material reparation should be made, while for attacks upon honor or prestige, the appropriate forms are regrets, disavowal, and salute.¹⁵ As a matter of theory, such a differentiation is acceptable; and some support could be doubtless found for it in practice. But it rarely happens that a moral damage occurs without a material damage being in ancillary attendance. If the offense consists merely in the failure of respect to a state, the state may be content with a more or less formal apology, which, in this light, could be regarded as the most imposing form of reparation. If the state is, however, presenting a claim for an injury done to one of its citizens, other elements than physical injury may enter into the calculation of the reparation to be made.¹⁶

§ 54. The usual standard of reparation, where restoration of the original status is impossible or insufficient, is pecuniary payment; for, as Grotius said, "money is the common measure of valuable things."¹⁷ It has usually been said that the damages assessed should be for the purpose only of paying the loss suffered, and that they are thus compensatory rather than punitive in character. Thus, Judge Parker, speaking under the terms of the Treaty, said:

In our opinion, the words exemplary, vindictive, or punitive as applied to damages are misnomers. The fundamental concept of 'damages' is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong. . . . The industry of counsel has failed to point

¹⁵ De Visscher, *Responsabilité*, pp. 118-119.

¹⁶ E. g., "That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury," Opinion in the *Lusitania Cases*, Mixed Claims Commission, U. S. and Germany, *Decisions and Opinions*, p. 27.

¹⁷ Grotius, *Rights of War and Peace*, II, XVII, 22, quoted by Umpire Parker in his Opinion in the *Lusitania Cases*, Mixed Claims Commission, U. S. and Germany, *Decisions and Opinions*, p. 19. "Just as dealings between individuals tend to express themselves in the end in a pecuniary liability of one kind or another, and as the majority of legal actions end in a pecuniary judgment, so it is with the dealings of states," Williams, in *Biblioteca Visseriana*, II, p. 2. See Wright, *Enforcement*, p. 95; de Visscher, *Responsabilité*, p. 118.

us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals.¹⁸

Arbitral tribunals have rarely been willing to award penalties,¹⁹ in the form of money payment beyond the damages actually occasioned, perhaps because of the absence of agreement in the treaty under which they have worked. The political departments of states have, however, at times demanded what were apparently penal damages; and it is often difficult to determine whether such payments are to be considered the fruit of the overbearing attitude of a strong toward a weak state, or whether they should be regarded as establishing the possibility of assessing penal damages against a state. In several important cases, the damages claimed have been out of all proportion to the actual pecuniary loss sustained.²⁰ There

¹⁸ Opinion in the *Lusitania Cases*, *loc. cit.*, pp. 25-27. See *ibid.*, p. 31: "Putting the inquiry only serves to illustrate how repugnant to the fundamental principles of international law is the idea that this Commission should treat as justiciable the question as to what penalty should be assessed against Germany as punishment for its alleged wrongdoing. It is our opinion that as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this Commission. . . . The Treaty is one between two sovereign nations—a Treaty of Peace. There is no place in it for any vindictive or punitive provisions. Germany must make compensation and reparation for all losses falling within its terms sustained by American nationals. That compensation must be full, adequate and complete. To this extent Germany will be held accountable. But this Commission is without power to impose penalties for the use and benefit of private claimants when the Government of the United States has exacted none."

In the *Carthage Case*, the Hague Court remarked, in refusing the pecuniary payment demanded, "as also the imposition of other pecuniary penalty appears to be superfluous and to go beyond the purposes of international jurisdiction," Wilson, *Hague Court Reports*, p. 335. "An international delinquency is not a crime," Oppenheim, *International Law*, I, p. 246, citing Schoen, *Haftung*, pp. 122-143. "Nor can these high damages be explained as exemplary damages. Our commission has no punitive mission, nor is there any offence to be punished," Umpire Lieber, in *Aaron Brooks Case*, Moore, *Arbitrations*, p. 4311. See Ralston, *Law and Procedure*, p. 267; Yntema, in *Columbia Law Review*, XXIV, p. 138; *Jethro Mitchell Case*, Lapradelle-Politis, *Recueil*, I, p. 471; *Norwegian Shipping Claims*, A. J., XVII, p. 390.

¹⁹ See Borchard, *Diplomatic Protection*, p. 419, who cites the *Torrey and Metzger Cases*, Ralston, *Venezuelan Arbitrations*, pp. 162, 578; Decencière-Ferrandière, *Responsabilité*, pp. 269-270.

²⁰ It would be difficult to explain the enormous indemnity extorted by Italy from Greece in any other fashion than as a punitive or vindictive procedure. The Boxer indemnity would seem to be plainly a punitive measure. Consider also the *Lienchou Riots*, *For. Rel.*, 1906, pp. 308-319; the murder of the consuls at Salonica in 1876, *Br. and For. St. Pap.*, 65, p. 949; *Moke's Case*, Moore, *Arbitrations*, p. 3411; *Lents Case*, Moore, *Digest*, VI, p. 794.

seems to be no theoretical objection, granted ascertainable rules of law and judicial enforcement, to the imposition of penalties by international law. Mr. Hyde speaks of the "value of exemplary reparation as a deterrent of conduct otherwise to be anticipated";²¹ and, unsatisfactory as may be such procedure at present, international law is badly in need of such sanctions. It can no longer be argued that the sovereign state is above the law; and there seems to be no reason why it should not be penalized for its misconduct, under proper rules and restrictions.

§ 55. International law provides no precise methods of measurement for the award of pecuniary damages. As has been above pointed out, the general rule is to restore the injured thing to integrity again or to offer an equivalent therefor; but the problems which arise in this effort may be as numerous as the cases themselves. The damage may have been caused by any one of a number of acts; and the various factors in each case will result in a different decision in each.²² Thus, in the confiscation of a vessel, it may be necessary to calculate the value of the vessel, its losses in port charges, or in freight due at the port of discharge, losses due to inability to fulfill charter parties, demurrage, wages, the value of the cargo, and interest.²³ For each type of injurious action, a

In the *Labaree Case*, says Mr. Hyde, "Mr. Root, Secy. of State, took occasion to point out the distinction between the 'remedial reparation due to the widow,' which had been fully made, and the 'exemplary redress due to the Government of the United States,'" *International Law*, I, pp. 516-517.

In the *Mannheim Case*, France demanded and received an indemnity of one million francs as *amende*, in addition to 100,000 francs indemnity for the family of the victim, Fauchille, *Traité*, I, p. 528, *Clunet*, 49, p. 1243. The *Lusitania* opinion points out that while Part VII of the Treaty of Versailles is headed "Penalties," the corresponding terms used in the Treaty of Berlin with the United States are "indemnities," "compensation," etc., *Decisions and Opinions*, pp. 27-28.

Writers do not appear to be hostile to the idea of penalties. Strupp remarks that it is not impossible to conceive of punishing a state, *Völkerrechtliche Delikt*, p. 217. See Hyde, *International Law*, I, pp. 515-516; Borchard, *Diplomatic Protection*, p. 419, and in *A. J.*, XXI, pp. 517-518.

²¹ Hyde, *International Law*, I, pp. 515-516.

²² "It is clear that in each particular case the computation of damages must largely be based upon the given facts; of necessity the problem is such that a considerable discretion must be exercised by the judge," Yntema, in *Columbia Law Review*, XXIV, p. 136.

²³ This example is taken from the arbitration between Great Britain and Brazil in 1829, *La Fontaine, Pasicrisie*, pp. 91-92. Another good example is the *Case of the Masonic*, *ibid.*, p. 281, *For. Rel.*, 1885, p. 699. Others may be found in Nielsen's *Report*, p. 419 (*Newchang*), pp. 430-431 (*Canadienne*), pp. 486-487 (*Lindisfarne*). Rules for estimating damages in the case of ships are given by Umpire Parker, for the Mixed Claims Commission, U. S. and Germany, *Decisions and Opinions*, p. 706,

different method of estimating the amount of damage may, perhaps, be required. In the case of contracts, it would appear to follow logically, from the fact that the internationally illegal act is not the breach of the contract, but the subsequent denial of justice, that damages should be measured upon a delictual, rather than upon a contractual, basis.²⁴ Yet arbitral tribunals have not hesitated to award damages for benefits which might have been anticipated from the performance of the contract,²⁵ though it must of course be clearly shown that the loss of such prospective profits was due to the breach of the contract.²⁶ There are many factors to be considered in calculating the indemnification which should be made on account of personal injuries, such, for example, as illegal imprisonment. Mr. Ralston sums it up in these words:

where the respondent government has been found liable awards have varied in amount dependent upon the physical or moral hardships connected with the imprisonment, its duration, the station in life of the person offended against, the incidental injury to or destruction of his business (although the latter would seem rather consequential than direct) and other special circumstances.²⁷

Administrative Decisions VII and VII-A; but it is to be noted that they are limited by the Treaty.

²⁴ "If redress is demanded on account of a denial of justice apart from the breach of contract, the damages attributable to the foreign territorial sovereign ought logically to be measured by a delictual rather than by a contractual standard, that is, by the extent of the harm suffered by the claimant through the commission of internationally illegal conduct, rather than by the prospective benefits lost through the breach of the agreement," Hyde, *International Law*, I, p. 548; and see Ralston, *Law and Procedure*, §§ 452-456.

²⁵ *Martini Case*, Ralston, *Venezuelan Arbitrations*, pp. 843-844; *Oliva Case*, *ibid.*, pp. 780-781; *Case of R. H. May*, Moore, *Digest*, VI, p. 731; *Metzger Case*, *ibid.*; *Delagoa Bay Railway Case*, *ibid.*, VI, pp. 727-728, *For. Rel.*, 1900, p. 903. See, *contra*, under the Treaty, the *William P. Frye Case*, Mixed Claims Commission, U. S. and Germany, *Decisions and Opinions*, p. 682; the *Maria Lorenz Case*, *ibid.*, p. 757.

²⁶ *Rudloff Case*, Ralston, *Venezuelan Arbitrations*, p. 183; *Oliva Case*, *ibid.*, pp. 780-781; *Union Bridge Co. Case*, American and British Claims Arbitration Tribunal, January 8, 1924, *A. J.*, XIX, p. 218.

²⁷ Ralston, *Law and Procedure*, § 467, citing numerous examples. The umpire in the *Topaze Case* examines eighteen cases (cited from Moore's *Arbitrations*) in which the award for imprisonment ranged from \$16 per day to \$25,000 for four hours. He concludes that the average award is \$100 per day, Ralston, *Venezuelan Arbitrations*, pp. 330-331. See also the *Giacopini Case*, in which other cases are added, *ibid.*, pp. 765-766. In the recent *Faulkner Case*, before the General Claims Commission, U. S. and Mexico, Docket No. 47, the amount of \$100 per day was accepted, but fifty per cent was added to it, because of the change in the value of money. In the *Roberts Case*, before the same Commission, \$8000 was awarded for excessively long imprisonment during seven months, and cruel and inhumane treatment suffered during nineteen months imprisonment.

Pecuniary damages resulting from death are recognized; but the amount awarded has varied widely.²⁸ This variation is the result of the principle that damages are not based upon any attempt to set a standard value for a human life, but upon the injury suffered by the claimants from the death of the decedent. In laying down his groundwork for decisions in the notable group of cases arising from the sinking of the *Lusitania*, Umpire Parker said:

In death cases the right of action is for the loss sustained by the *claimants*, not by the state. The basis of damages is, not the physical or mental suffering of the deceased, or his loss, or the loss of his estate, but the losses resulting to claimant from his death. The enquiry then is: What amount will compensate claimants for such losses?²⁹

To attain that end he adopted the following formula:

Estimate the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death.³⁰

²⁸ Mr. Borchard says that the Department of State, in the case of deaths in the Boxer Uprising, fixed the value of an adult life at \$5000, and that of a child at \$2500. The British and French governments, for the same uprising, estimated indemnity upon expectancy of life and the earning capacity of the deceased, Borchard, *Diplomatic Protection*, p. 425. In the *De Caro Case*, Umpire Ralston took into consideration not only the earning power of the deceased, but his station in life and the deprivation of companionship and shock which his wife suffered; and awarded 50,000 bolivars, Ralston, *Venezuelan Arbitrations*, p. 770. For the killing of Brignon by a forest guard, Germany paid to 50,000 francs, *Clunet*, 20, p. 218. Mexico offered, for the death of McManus, in 1915, 160,000 pesos, *For. Rel.*, 1915, p. 866. The United States demanded for the murder of Imbrie \$60,000, and \$110,000 more for the cost of transporting his body home; and \$175,000 for the death of Miller, before the Special Claims Commission, U. S. and Mexico, Docket No. 94. See Administrative Decision No. VI of the Mixed Claims Commission, U. S. and Germany, *Decisions and Opinions*, p. 195. The awards made by this Commission for deaths in the *Lusitania* ranged from a few hundred dollars for the husband of a waitress who earned \$18 per week, to \$140,000 for the wife of a wealthy real estate operator. See Borchard, *Diplomatic Protection*, § 177.

²⁹ Mixed Claims Commission, U. S. and Germany, *Decisions and Opinions*, p. 19. And see the *Tesson Case*, *ibid.*, p. 363: "The awards which this Commission is empowered to make in death cases are based, not on the value of the life lost, but on the losses resulting to the claimants from the death, insofar only as such losses are susceptible of being measured by pecuniary standards."

³⁰ *Ibid.*, pp. 19-20. The above formula is discussed in detail in the pages following it.

Damages are sometimes claimed for the element of injury to the state itself, in the death of one of its members.⁸¹

§ 55a. In the more recent *Case of Laura M. B. Janes*, before the General Claims Commission, U. S. and Mexico, a different criterion is set up. The opinion in this case refers to the "old theory" which assumes the complicity of the state in the act of the individual, and which therefore imposes upon the state complete liability for that act. But,

The damage caused by the culprit is the damage caused to Janes' relatives by Janes' death; the damage caused by the Government's negligence is the damage resulting from the non-punishment of the murderer.

In the case of a poor man, the opinion proceeds, the older theory would result in the payment of a small sum, though the indignity might have been great; and, on the other hand, it would be to the pecuniary advantage of the widow if a Government did not measure up to its international standard of providing justice. The Commission therefore throws off the older doctrine, and bases damages upon denial of justice, pointing out that claimants have always been given substantial compensation for serious dereliction of duty on the part of a Government. It is admitted that the computation of damages for denial of justice is more difficult than for a killing; but it is argued that it is no more difficult than for oppressive imprisonment and like cases. It is possible, too, to take into account various shades of denial of justice, proportioning the amount to be paid according to the extent of the negligence shown by the government in the performance of its duties. The Commission made an award of \$12,000.⁸²

Logical and impressive as is the reasoning of the Presiding Com-

⁸¹ See Administrative Decision No. VI, *ibid.*, p. 195; especially the dissenting opinion of the German Commissioner concerning an American citizen, through marriage, who made a claim for the death of her father, a British national. Note also the criticism of this decision by Mr. Borchard, in *A. J.*, XX, pp. 70-71. Mr. Borchard is apparently urging exemplary damages: "If states permitted their citizens to be killed abroad promiscuously or without redress by other states or their officials, the 'injured' state would soon lose prestige and its citizens that security which diplomatic protection is designed to afford." In the *Santa Ysabel Cases*, before the Special Claims Commission, U. S. and Mexico, the United States argued that the destruction of one of its citizens means the loss of an important asset to the nation, which must be taken into consideration in making "full indemnification," under the Treaty.

⁸² *Case of Laura M. B. Janes*, General Claims Commission, U. S. and Mexico, Docket No. 168, November 16, 1926, §§ 19-27.

missioner in this opinion, the precedents arrayed by Mr. Nielsen, in his concurring opinion in support of the older theory, are equally impressive. Indeed, there can be no doubt that, as Mr. Nielsen says, practice has consistently supported the award of pecuniary damages where the state has not properly redressed injuries to aliens committed by individuals, in much the same measure as if the state were itself responsible for the damages arising from the act of the individual.^{32a} This practice, however, does not provide the theoretical solution for which Mr. Van Vollenhoven was seeking. The current doctrine rules, as has been seen, that the state is responsible only for its own act, and never for that of an individual—consequently, it would seem, it can only be held to damages resulting from its own act or, as in this case, its own omission. This is the position taken by the *Institut de Droit International* at its recent meeting.^{32b} How, then, is theory to be reconciled with practice? By what logical connection can damages be assessed for the state's omission to exactly the same measure as for the act of the individual?

In the first place, it is believed that, as is elsewhere pointed out,^{32c} the Grotian theory of complicity, or condonation, upon which Mr. Nielsen relied, is no longer acceptable. One may argue that the state is irresponsible for damages resulting from an individual's

^{32a} Mr. Nielsen cites, in support of his position, Pradier-Fodéré, *Traité*, I, p. 336, pp. 615-616; Vattel, *Law of Nations*, II, pp. 161-162; Twiss, *The Law of Nations*, Part 2, Par. II, p. 20; Martens, *Traité*, I, p. 563; Secretary of State Fish, August 15, 1873, Moore, *Digest*, VI, p. 655; Mr. Mariscal to Mr. Fish, January 30, 1875, *For. Rel.*, 1875, II, p. 957; Poggioli Case, Ralston, *Venezuelan Arbitrations*, p. 869; Cotesworth and Powell Case, Moore, *Arbitrations*, pp. 2082, 2085; Glenn Case, *ibid.*, p. 3138; Piedras Negras Claims, *ibid.*, p. 3035; Davy Case, Ralston, *Venezuelan Arbitrations*, p. 412; Di Caro Case, *ibid.*, pp. 769-770.

Mr. Van Vollenhoven cites the Glenn Case, as does Mr. Nielsen; the *Lenx Case*, Moore, *Digest*, VI, p. 794; the *Renton Case*, *ibid.*; Hyde, *International Law*, I, p. 515; Schoen, *Haftung*, p. 38; and with regard to dereliction of duty on the part of the state, the Davy Case, Ralston, *Venezuelan Arbitrations*, p. 412; and the *Maal Case*, *ibid.*, p. 916.

The fact that two of these cases, as well as a third mentioned by Mr. Van Vollenhoven (*The Mexican Shepherds*, Schoen, *Haftung*, p. 38), are quoted on both sides of the question, reveals the difficulty of deriving the theory from practice. It may be suggested, as furnishing the slight illumination of analogy, that in other cases of negligence on the part of the government, such as undue imprisonment, delay in prosecution, etc., the award has frequently been estimated upon the basis of the material damage to the alien caused by the individual's act, rather than upon the basis of the damage caused by the government's negligence. Indeed, as employing the latter basis, the *Janes Case* stands almost alone, a challenging bit of pioneering.

^{32b} Resolutions of the *Institut*, Article 11, Cl. 2, Appendix III, *infra*.

^{32c} See § 24, and Ch. V, note 1, *supra*; and § 59, *infra*.

act, but that the state is estopped, through its omission to perform its international duties of redress, from pleading this irresponsibility. But it is difficult to find positive ground for such a position: for what reason is the state estopped from pleading its usual irresponsibility, unless there is a positive affirmation in international law to that effect? And if there is such a positive affirmation in international law, upon what is it based? Again, it may be suggested that, since it is the duty of the state to redress, through local remedies, the injuries caused to aliens by individuals, it follows that when the state has failed in this duty, it must make reparation in the usual manner, that is by pecuniary compensation, the ultimate form of redress. Or, finally, it may simply be said that practice has arbitrarily fixed as the measure of damages in such cases the actual material loss suffered because of the individual's act—an assumption broad enough to cover any or all of the preceding hypotheses. In this case, such damages are apparently to be regarded as penal in character.^{32d}

Whatever the theory in the mind of the judge, there is no doubt that awards have usually been estimated in proportion to the damages resulting from the act of the individual rather than upon the basis of the damages resulting from the negligence of the state—a basis which would afford but little room for compensation to the injured alien. And, whatever the theory, it is difficult to avoid the conclusion, denied by most writers and tribunals, that the real basis for such damages is to be found in the responsibility of the state for all injuries suffered by aliens within its jurisdiction. This would seem to be the inescapable logic of a situation in which the state is given exclusive territorial jurisdiction; though in operation the resultant responsibility would be the same, since the state would be permitted, as it now is, to discharge its responsibility by the effi-

^{32d} If the award is made, not upon the basis of a material loss, but because of the negligence of the government (for which it would be difficult to show a material loss connected with the claimant), it would appear to have the character of a penalty against that government. "But the inarticulate purpose of such damages, which may or may not be actually compensatory, must involve the theory that by such penalty the delinquent government will be induced to improve the administration of justice and the claimant government given some assurance that such delinquencies, to the injury of its citizens, will, if possible, be prevented in the future," Borchard, in *A. J.*, XXI, p. 518. Mr. Borchard approved of the decision to the extent that it is "analytically correct and because it recognizes various degrees of governmental delinquency."

cient operation of its local agencies of redress, diplomatic interposition or a pecuniary claim being permissible, as is now customary, only when these remedies are lacking or inefficient.^{32e} It is doubtless true, at present, that states are not prepared to accept this theory.

For damages due to the taking or destruction of property, it does not seem possible to state with any assurance a definite rule of measurement. Arbitral tribunals have at times allowed for future profits which might have accrued, while in other cases they have confined the reparation to the value of the property at the time of the seizure.³³

§ 56. An important controversy connected with the measure of damages lies in the question as to whether, or to what extent, so-called indirect damages may be awarded. In many cases, reparation has been required not only for *damnum emergens*, but also for *lucrum cessans*. The words of Commissioner Bainbridge, in the *Irene Roberts Case*, may be quoted as illustration:

Under these circumstances well established rules of international law fix a liability beyond that of compensation for the direct losses sustained. . . . The derangement of Mr. Quirk's plans, the interference with his favorable prospects, his loss of credit and business, are all proper elements to be considered in the compensation to be allowed for the injury he sustained.³⁴

On the other hand, arbitrators have frequently declined to take into consideration what has been vaguely included in the term 'indirect damages.' In the *Dix Case*, it was held that

^{32e} See § 60, *infra*; and Schoen, *Haftung*, § 4, p. 38 *et seq.*, quoted in the *Janes* opinion.

³³ See discussion in the following section; and Administrative Decision No. VII of the Mixed Claims Commission, U. S. and Germany, *Decisions and Opinions*, p. 273.

³⁴ Ralston, *Venezuelan Arbitrations*, p. 145. It must be observed that in studying arbitral decisions, the terms of reference to the tribunal as stated in the *compromis d'arbitrage* should be given careful consideration, as they may force the arbitrator into a position out of harmony with the usual rules of international law. Thus, the German Commissioner, Kiesselbach, before the German-American Mixed Claims Commission, argued: "I do not dispute that *under international law* compensation may be awarded for loss of income caused through the illegal act of a government. But I do not think that under the wording and the intent of the Treaty of Berlin such claim should be allowed," *Decisions and Opinions*, p. 306. See, similarly, Article IX of the General Claims Convention between the United States and Mexico, Treaty Series No. 678. Consider the 1927 Resolutions of the *Institut*, Articles 10 and 11, Appendix III, *infra*.

Governments like individuals are responsible only for the natural and proximate consequences of their acts. International as well as municipal law denies compensation for remote consequences, in the absence of deliberate intention to injure.⁸⁵

In assuming the latter position, and rejecting 'indirect damages,' tribunals have apparently followed the precedent of the Geneva Award in the *Alabama Case*.⁸⁶

However, this interpretation of the *Alabama* decision and its value as a binding precedent have been weakened within the past few years by direct attacks upon it. Mr. Yntema says:

the effect of the award cannot be properly extended so far as to deduce therefrom a rule that all claims for indirect or consequential damages are without legal foundation. . . .

The Geneva Tribunal did not decide that indirect claims are generally to be disallowed and, if it had so decided, its *dictum* would have been incompetent. It was empowered to adjudicate only certain specific claims. . . .

Furthermore, as Bluntschli has somewhat acutely observed, all the so-

"It is contended in the answer that the damages claimed are 'remote, speculative, contingent, and incapable of ascertainment.' As to this, it is enough to say that a long line of decisions of international tribunals has established as the measure of damages for such cases loss of use of the vessel, to be measured by the loss of probable catch," *The Horace B. Parker Case*, American and British Claims Arbitration Tribunal, A. J., XIX, p. 379; citing three previous decisions of the same tribunal, and also *The Hope On*, Moore, *Arbitrations*, p. 3261; *Bering Sea Damage Claims*, *ibid.*, pp. 2123, 2131; *Costa Rica Packet*, *ibid.*, p. 4948; and *For. Rel.*, 1902, App. I, pp. 451, 454, 459.

Other examples of award for lost profits are: *Aspinwall Case*, Moore, *Arbitrations*, p. 1007; *Martini Case*, Ralston, *Venezuelan Arbitrations*, p. 819; *Poggioli Case*, *ibid.*, pp. 847, 870; *Delagoa Bay Railway Co. Case*, La Fontaine, *Pasicrisie*, p. 402; *Fabiani Case*, *ibid.*, p. 343; *Masonic Case*, *ibid.*, p. 281, *For. Rel.*, 1895, p. 699; *Don Pacifico Case*, Lapradelle-Politis, *Recueil*, I, p. 595; *Cheek Case*, Moore, *Arbitrations*, p. 5068; *Aaron Brooks Case*, *ibid.*, p. 4310; and the following citations in the decisions of the *Tribunaux Arbitraux Mixtes*; 1922, pp. 350, 397, 488.

In the *Fabiani Case*, "dommage causé par la faillite" and "dommage indirect" constituted three times as much as the other items combined. In the *Case of the Masonic*, \$5000 per year for anticipated profits was allowed.

⁸⁵ Ralston, *Venezuelan Arbitrations*, p. 9. See also the *Heny Case*, *ibid.*, p. 25; *Valentiner Case*, *ibid.*, p. 562; *Oliva Case*, *ibid.*, p. 781; *De Caro Case*, *ibid.*, p. 817; Doctrinal note to *Yuille Shortridge Co. Case*, Lapradelle-Politis, *Recueil*, II, p. 117; *Wm. Lee*, *ibid.*, p. 283; *Affaire Lacaze*, doctrinal note, *ibid.*, II, p. 304; *Canada*, *ibid.*, II, pp. 635-636; *Brick William*, *ibid.*, I, pp. 470-471; *Cowper Case*, *ibid.*, I, p. 348; *Baldwin Case*, *ibid.*, I, pp. 466-467; *Boyne Case*, Moore, *Arbitrations*, p. 3926; *Cauty's Case*, *ibid.*, p. 3309; *Pelletier Case*, *ibid.*, p. 1779; *Salvador Commercial Co.*, *For. Rel.*, 1902, p. 872.

⁸⁶ The Geneva Award "has been regarded as a reliable precedent by numerous other arbitral tribunals, which have disallowed indirect claims based upon loss of anticipated

called Alabama claims were indirect. . . . The Alabama award, therefore, far from serving as a precedent to the contrary, may be cited as authority for the allowance of claims for indirect damage in international law.³⁷

The German-American Mixed Claims Commission, which had occasion to make a thorough historical and analytical study of the value of the *Alabama Award* as a precedent, came to the same conclusion, expressed in the following emphatic words:

The use of the term 'indirect' as applied to the 'national claims' involved in the Alabama Case is not justified by the early debates in the Senate of the United States, by the record of the preliminary diplomatic negotiations, by the Treaty of Washington, by the 'American Case' as presented by the American Agent, or by the Award. Its use in this connection has been productive of great confusion and misunderstanding. The use of the term to describe a particular class of claims is inept, inaccurate, and ambiguous. The distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful, and should have no place in international law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term 'remote.' The distinction is important.³⁸

The word 'indirect,' in connection with the assessment of damages, does not possess a sufficiently precise denotation to justify its use as a term of international law. It is often a subjective matter with the reader as to whether, in a certain case, the damages awarded are to be considered as direct or indirect; and the inconsistencies of practice and the divergent opinions of writers can be put upon a footing of common agreement if more precise terminology can be found.³⁹ Certainly, whether the term 'indirect' may

profits, loss of credit, and similarly consequential elements of loss," Borchard, *Diplomatic Protection*, p. 414; and see Ralston, *Arbitral Law*, p. 169; Lapradelle-Politis, *Recueil*, I, p. 596, note 2; Yntema, in *Columbia Law Review*, XXIV, p. 150; Boyne Case, cited in previous note; Decencière-Ferrandière, *Responsabilité*, p. 253.

³⁷ In *Columbia Law Review*, XXIV, p. 151.

³⁸ Opinion in *War-Risk Insurance Premium Claims, Decisions and Opinions*, at p. 58. See also Lapradelle-Politis, *Recueil*, II, p. 977.

³⁹ Schoen, *Haftung*, p. 126 and note 10; Yntema, in *Columbia Law Review*, XXIV, p. 139; Borchard, *Diplomatic Protection*, p. 418; Decencière-Ferrandière, *Responsabilité*, p. 254.

"Il faut avouer, d'ailleurs, qu'on se trouve ici en présence d'une notion, à la fois complexe et imprécise, et que les arbitres sont bien excusables de n'avoir pas su démêler de façon exacte s'ils se trouvaient en présence de dommages directs ou de

be applied to such cases or not, damages have often been awarded for more than the mere physical property destroyed: they have included the loss of profits and other elements more or less indirect, provided always a causal connection could be established. In many of the cases cited as rejecting indirect damages in principle, it will be found that the real basis for the decision was the insufficiency of the evidence presented, or the uncertainty of the causal connection between the injurious act and the losses claimed.⁴⁰ It is not believed that such opinions must be construed as denying the universal principle that complete compensation should be made for damage caused by an injury.⁴¹ The problem consists rather in the inquiry: Has the act complained of produced the loss claimed?

Toward the solution of this problem the opinion of Umpire Parker, in laying down the principles of operation for the German-

dommages indirects," Hauriou, "Les dommages indirects dans les arbitrages internationaux," *R. D. I. P.*, 31 (1924), p. 212; and see pp. 218-219. Hauriou points out many of the inconsistencies of practice. Thus, he contrasts the *Case of the Wm. Lee* (Lapradelle-Politis, *Recueil*, II, p. 282) with that of the *Canada* (*ibid.*, II, p. 635); and *Yuille Shortridge Co.* (*ibid.*, p. 94) with the *Affaire Lacaze* (*ibid.*, p. 298). As to consequential damages, he remarks that more contradictions could not be packed into one term.

While the United States classified certain of the *Alabama* claims as indirect, England was willing to class them as direct, Schoen, *Haftung*, p. 127, note 11; Yntema, in *Columbia Law Review*, XXIV, p. 140; Moore, *Arbitrations*, pp. 589, 646. Hauriou in the article above cited, p. 212, asserts that in these claims the expense of pursuing the Confederate cruisers, the prolongation of the war, the high insurance rates, afford classic examples of *damnum emergens*, and yet were classified as indirect damages.

⁴⁰ Some of the cases are so uncertain in their interpretation that they have been cited by the proponents of each side of the controversy. Thus, the *Poggioli Case* and that of the *Costa Rica Packet* are quoted by Mr. Borchard as having been disallowed as indirect claims, *Diplomatic Protection*, p. 414, note 2; and by Mr. Yntema as showing that full compensation is to be made, *Columbia Law Review*, XXIV, p. 147, notes 47 and 49. In the former case, Mr. Borchard is correct that a claim based upon threats which caused the non-payment of debts was disallowed; but, on the other hand, over half the total award was for loss of crops over a period of three years, Ralston, *Venezuelan Arbitrations*, pp. 870-871. In the *Costa Rica Packet Case*, the arbiter denied damages for loss of the fishing season, not because of any objection to such damages in principle, but because part of the season remained, and because the work could have been continued by a subordinate, La Fontaine, *Pasicrisie*, p. 509.

In many cases in which indirect damages have apparently been rejected, it will be found that they have been rejected because of the evidence before the tribunal. Thus, in the *Rudloff Case*, Commissioner Bainbridge said: "Under these circumstances any estimate of the pecuniary advantages derivable from the contract is necessarily conjectural. Damages to be recoverable must be shown with a reasonable degree of certainty and cannot be recovered for an uncertain loss," Ralston, *Venezuelan Arbitrations*, p. 198. See similarly, the *De Caro Case*, *ibid.*, p. 817; *Valentiner Case*, *ibid.*, p. 563; *Oliva Case*, *ibid.*, p. 781; *Sanchez Case*, *ibid.*, p. 938.

⁴¹ See the study made by Yntema, in *Columbia Law Review*, XXIV, pp. 141-145.

American Mixed Claims Commission, made a clear and definite contribution, in his restatement of the familiar rule of proximate cause:

a rule of general application both in private and public law—which clearly the parties to the Treaty had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain, and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. But the law can not consider . . . the causes of causes and their impulsion one on another. Where the loss is far removed in causal sequence from the loss complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or to follow through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed.⁴²

Additional aid is to be obtained from the suggestions of M. Hauriou and Mr. Yntema. The former divides so-called indirect damages into *dommages éloignés* and *dommages étrangers*.⁴³ Under the latter heading, he includes situations in which elements entirely foreign to the generating cause of the injury enter; and these he eliminates entirely from consideration.⁴⁴ *Dommages éloignés* in-

He cites, in support of indirect damages for international law as well as for private law, Phillimore, Pradier-Fodéré, Rivier, Heffter, Bluntschli, Triepel, Schoen, and others. Schoen admits indirect damages and says that if they are denied in individual case, it is because of treaty agreement, or the evidence, *Haftung*, p. 124; see also Lapradelle-Politis, *Recueil*, doctrinal note to *Alabama Case*, II, p. 977; Borchard, *Diplomatic Protection*, p. 416.

⁴² Mixed Claims Commission, U. S. and Germany, Administrative Decision No. II, *Decisions and Opinions*, pp. 12-13; see also pp. 46, 51-52, 57-59.

⁴³ Hauriou, "Les dommages indirects dans les arbitrages internationaux," *R. D. I. P.*, 31, pp. 203-232.

⁴⁴ Hauriou, *loc. cit.*, p. 215. He gives several illustrations of damages whose rejection was due to such foreign elements, though generally considered due to the fact that they were indirect. Thus, in the *Yuille Shortridge Co. Case*, it was shown that at the time the company claimed its losses were due to judicial action, there was a coincident panic in the wine industry. In the *Cowper Case*, the loss of slaves was not enough to account for the loss of crops, since other help might have been hired. And he suggests that if the depredations by the *Alabama* caused the war to last longer, another reason for this delay was the poor military direction of the war by the United States.

clude injurious effects which are repercussions of the principal injury, but whose origin is nevertheless to be found therein; and these should be retained, though compensation in such cases need not be integral. Alongside of this quite proper exclusion of extraneous considerations, it is necessary to reject damages in those cases in which the connection is too remote, or has been insufficiently proved. It is this aspect of the question which is emphasized by Mr. Yntema:

It should be obvious that the exclusion in particular instances of claims for damage which can not be properly proved, either because the damage is not reasonably attributable to the occurrence giving rise to injury or because it is too contingent to be estimated, is in no sense incongruous with the acceptance of the general rule of complete reparation of damage done in international law. It should scarcely be necessary to refer to cases of this character, since they go only to show that under the peculiar circumstances of each special case, the damage was deemed too remote, and at the most only support the truism that claims for damage, too uncertain or too remote to be adequately proved, are to be rejected.⁴⁵

There can be no doubt that practice, and especially modern cases, admit, in the calculation of the damages due because of an injury, the losses which flow, either directly or indirectly, therefrom.⁴⁶ The phrase 'indirect damages' has no precise meaning; and it should be dropped from the terminology of international law as misleading and confusing. Referring back to the principle of reparation with which this chapter was begun, it may be said that all damages which can be traced back to an injurious act as the exclusive generating cause, by a connected, though not necessarily direct, chain

⁴⁵ Yntema, *loc. cit.*, pp. 148-149. See also Lapradelle-Politis, *Recueil*, II, p. 979; Decencière-Ferrandière, *Responsabilité*, p. 255.

⁴⁶ "Under the terms of the Treaty of Berlin, as construed by Administrative Decisions Nos. I and II handed down this day, Germany is financially obligated to make full and complete compensation for all losses sustained by American nationals proximately caused by Germany's acts." The responsibility of Germany was denied in this case, however, because it could not be shown that the acts complained of were, under the Treaty, capable of engaging the responsibility of Germany, Opinion in the *War-Risk Premium Claims*, Mixed Claims Commission, U. S. and Germany, *Decisions and Opinions*, p. 59. See also case of *Eisenbach Brothers*, before the same Commission, *ibid.*, p. 269; Opinion in the *Lusitania Cases*, *ibid.*, p. 19, *et seq.*; Administrative Decision No. II, *ibid.*, p. 11; *Mohegan Case*, *ibid.*, p. 671; *Case of the Horace B. Parker*, American and British Claims Arbitration Tribunal, November 6, 1925, *A. J.*, XX, p. 379; Argument of the United States before the Special Claims Commission, U. S. and Mexico, in the case of *Darling T. Baldwin*, Docket No. 448; *Aspinwall Case*, Lapradelle-Politis, *Recueil*, II, p. 675.

of causation, should be integrally compensated;⁴⁷ but, if other elements enter into the production of the harm alleged, compensation should be made in proportion to the damage actually caused by the respondent's act. Such profits as are capable of precise estimation may be included. A large degree of discretion must necessarily be left to the judges, as to the boundary line between damage remotely caused, but not too remote to admit of liability, and that which is too far removed to justify the imposition of an indemnity.

§ 57. The award of interest is usually considered to be merely a part of the duty to make full reparation:

But as compensation was not made at the time of taking, the payment *now* or at a later day, of the value which the property had at the time and place of taking would not make the claimant whole. He was then entitled to a sum equal to the value of his property. He is *now* entitled to a sum equal to the value which his property then had plus the value of the use of *such sum* for the entire period during which he is deprived of its use. Payment must be made *as of* the time of taking in order to meet the full measure of compensation.⁴⁸

Arbitral tribunals have felt that it was not outside of their jurisdiction to award interest, even though the Convention by which

⁴⁷ Mr. Yntema sums up his conclusions as to the rules for the measure of damages as follows: (a) Whenever an international liability arises, there is a duty to make complete compensation and therefore for all the prejudicial consequences of the occurrences giving rise to the liability, whether the damage thus ensuing is direct or indirect. (b) The only limitations upon this duty spring from evidential or equitable considerations: (1) The damage must be shown to be a consequence of the occurrence. (2) It must be reasonably capable of estimation. (3) The compensation must be reasonably adjusted to the particular circumstance of the individual case. Yntema, in *Columbia Law Review*, XXIV, p. 153.

"Le seul principe qu'on puisse poser c'est que réparation est due pour tout dommage résultant des faits générateurs de la responsabilité dans l'exacte mesure dont il se rattache à eux. Déterminer le degré de cette dépendance, c'est une question de fait et d'espèce, qui doit être laissée à la libre appréciation du juge," Lapradelle-Politis, doctrinal note in *Alabama Case*, *Recueil*, II, p. 977.

⁴⁸ Mixed Claims Commission, U. S. and Germany, Administrative Decision No. III, *Decisions and Opinions*, p. 63.

"Interest, according to the usage of nations, is a necessary part of a just national indemnification," Davis, Notes, Moore, *Digest*, VI, p. 1029.

"The tribunal is of the opinion that all interest-damages are always reparation, compensation for culpability. From this point of view all interest-damages are compensatory, whatever name they may be given," Permanent Court of Arbitration in *Case of Russia v. Turkey*, quoted in Ralston, *Law and Procedure*, p. 129; and see the discussion of interest in general by Mr. Ralston, *ibid.*, pp. 127-136. Also, Moore, *Arbitrations*, Ch. LXXI, p. 4313 *et seq.*; Borchard, *Diplomatic Protection*, p. 428; *Christern & Co.*, Ralston, *Venezuelan Arbitrations*, p. 520; *Motion for Allowance*

they were set up made no mention of interest.⁴⁹ Where the treaty merely provides for the establishment of the amount of damages due, such action may be interpreted as an effort to restore the claimant as nearly as possible to the same position which he occupied before the injury was committed.

The investigation which is to be made is not usually one of whether interest shall be awarded, but the dates within which it shall run. Again, Umpire Parker has given a definite answer:

There is no basis for awarding damages in the nature of interest where the loss is neither liquidated nor the amount thereof capable of being ascertained by computation merely. In claims of this class no such damage will be awarded, but when the amount of the loss shall have been fixed by this Commission the award made will bear interest from its date. . . .

But where the loss is either liquidated or the amount thereof capable of being ascertained with approximate accuracy through the application of established rules by computation merely as of the time when the actual loss occurred, such amount, so ascertained, plus damages in the nature of interest from the date of the loss, will ordinarily fill a fair measure of compensation.⁵⁰

In the former class, where the loss was unliquidated, claims for losses based upon "personal injuries, death, maltreatment of prisoners of war, or acts injurious to health, capacity to work, or honor" were placed, bearing interest from the date the amount was fixed by the Commission. In the latter group were included

of Interest, *ibid.*, p. 413; *Interest on Diplomatic Debt Case*, *ibid.*, p. 423; *Macedonian Case*, Lapradelle-Politis, *Recueil*, II, p. 223; *The Lord Nelson*, Nielsen's Report, p. 434.

⁴⁹ "The question of the allowance of interest has arisen before almost every international tribunal, and usually, and except where the claim was for a tort purely, its allowance has been considered rightful, differences more frequently arising as to the time of its commencement or termination and the rate at which it should be allowed," Ralston, *Law and Procedure*, § 212. In the remainder of this section, Mr. Ralston gives a long list of the various Commissions which have awarded interest and the rate of interest which they have employed.

"The jurisprudence of all civilized nations now recognizes this principle as between individuals in case of contract, and has extended it to compensation for taking of or injury to property. . . . It is certainly a reasonable presumption from this uniform international recognition of this right as between individuals that the nations would recognize its justice as between themselves," Umpire Duffield, in the case of *Christern & Co.*, Ralston, *Venezuelan Arbitrations*, p. 521. The Alabama Claims were paid with 6% on the amount found due, Moore, *Arbitrations*, p. 4641; and the same rate was used in the *Wimbledon Case* before the Permanent Court of International Justice. Interest is often provided for in arbitral conventions. See Malloy, *Treaties*, I, p. 1103; III, p. 2751; Charles, *Treaties*, p. 56; Nielsen's Report, p. 9.

⁵⁰ Mixed Claims Commission, U. S. and Germany, *Decisions and Opinions*, p. 62.

"claims for property taken, damaged, or destroyed," for which the injury was calculated from the date of the injury.⁵¹ The rate of interest is determined according to the circumstances, the object being to determine a just compensation for the wrong.⁵²

⁵¹ Commissions have sometimes dated interest from the time the claim was brought to the attention of the respondent government, Ralston, *Law and Procedure*, pp. 133-134, referring to the *Cervetti Case*, Ralston, *Venezuelan Arbitrations*, p. 658; *de Garmendia Case*, *ibid.*, p. 413; *Henriquez Case*, *ibid.*, p. 896; and others. In the *Russian Indemnity Case*, The Hague Court held that interest may be demanded under international law, but that Russia, by extending the time of payment and failing to demand interest, had lost the right to interest, *A. J.*, VII, p. 146. See *Cases of Wm. A. Parker*, Docket No. 127, December 6, 1926; *J. Parker Kirlin*, Docket No. 387, December 6, 1926; *John B. Okie*, Docket No. 275, December 6, 1926; and *Illinois Central Railroad Co.*, Docket No. 432, December 6, 1926, all before the General Claims Commission, U. S. and Mexico.

⁵² The German-American Mixed Claims Commission awarded 5%. For the rules governing this, see *Decisions and Opinions*, p. 69. The legal rate of the state in question is often set, *Lord Nelson*, *Nielsen's Report*, p. 435. The umpire of the Spanish-American Claims Commission allowed 8% for the seizure of property in violation of treaty stipulations, Moore, *Arbitrations*, p. 3673. See the *Norwegian Shipping Claims*, *A. J.*, XVII, p. 396; *Cases of Sidra, Jessie, and Favourite*, in *A. J.*, XVII, pp. 113, 116, 304; doctrinal note on the *Macedonian Case*, *Lapradelle-Politis, Recueil*, II, pp. 226-229.

CHAPTER IX

CONCLUSIONS

§ 58. The most important result of the study of the principle of responsibility in international law is the growth of respect for the idea that the so-called sovereign state is not irresponsible, and the acknowledgment that it is subject to external restraint; and the substitution, in place of irresponsible sovereignty, of constantly widening rules of responsibility to which states are legally bound to submit. The idea of sovereignty—"the ghost of personal monarchy sitting crowned on the grave thereof"¹—is thoroughly out of harmony with modern theories necessarily resulting from an age of increasing interdependence between men and between geographical and economic areas. It is a derelict from the past, occasionally bobbing up to disturb the intercourse between states, but no longer bearing the breath of life within it. No state would to-day deny its responsibility for an action which it admitted to be illegal, proved against it under international law, much less assert a sovereign disregard for and superiority over international law in general. Such a position is not found in the arguments of states before tribunals of arbitration, or in the diplomatic correspondence between states. It is a conceded fact that the sovereign independence of a state may not be set up as a barrier to a liability imposed upon that state by international law: the only question that now arises is whether, under such rules of international law as are provided, responsibility may be imputed to a state.

Power breeds responsibility. It is in the fact that states to-day have a much greater degree of control over events within their territories that, paradoxically, is to be found the explanation of the steadily increasing responsibility of the state externally. A state is increasingly willing to accept responsibility for actions within its territories, if it has sufficient authority over such actions; and, on the other hand, the injured state finds itself better able to point out

¹ Quoted by Garner, "Limitations on National Sovereignty in International Relations," *Political Science Review*, XIX, pp. 1-24.

delinquencies occurring within the respondent state. If, by international law, a state enjoys exclusive jurisdiction within its boundaries, it does so upon the understanding that the state will endeavor to prevent or repair injuries to other states or their nationals occurring within its jurisdiction. The greater the efficiency of the government provided by the state, or, in other words, the greater the control which a state is able to exercise over those within its boundaries, the more willing is the community of nations to entrust to that state the protection of foreign interests therein. If the state lacks sufficient power for this purpose, or is indisposed to exercise it, other states may prefer to assume responsibility for the protection of their own nationals therein, by means of intervention or otherwise. Exclusive jurisdiction is a right under international law; but it also involves duties under that law. To the alien, the state must give the same protection as to its own nationals, perhaps even better; consequently, in proportion as it increases its domestic duties, it likewise expands its international responsibility. Thus, the expansion of the sovereign power within the state increases rather than decreases its responsibility to other states.

The expansion of international law itself has, of course, produced a corresponding expansion in the application of the principle of responsibility between states. Responsibility is a fundamental principle, whose roots ramify deeply beneath the entire field of international law; and as new rules are laid down to meet the exigencies due to the increasingly complex relationships between men and states, the range of operation of the principle of responsibility automatically widens. A far more imposing number of injuries may now be listed for which a state may be legally held to account than could have been given a century or so ago. One may suggest the increased responsibilities placed upon states which have assumed protectorates, or which control international waterways; the enormously extended protection now accorded to aliens, or occasionally to minority groups; and, still in the problem-stage, such matters as the control of raw materials; or the attempt of moribund sovereignty, by a sort of mortmain, to exclude from international law the consideration of so-called domestic questions.

The widening range of responsibility among states is witnessed not only by the greater number of injuries which have come to be regarded as illegal and as giving rise to international claims, but

also by the extent of reparation which may now be demanded. The state may now be called upon to pay not only direct, but indirect damages, in the sense in which that term has been explained above; and it has, in some cases, apparently, been forced not only to *restituto in integrum*, but to pay an added *penalty*, or exemplary damages, for the breach of international law. And finally, the sanctions by which responsibility is enforced have been strengthened until a question arises as to whether a state may be held responsible, not merely to the injured states, but to the entire community of nations as well.

While it may seem unnecessary to press the point that unlimited sovereignty has given place to responsibility, to do so is not entirely a work of supererogation; for the roots of international law have grown out of a soil in which the doctrine of sovereignty was a vital element, and many years will be required before the influence of the theory is entirely eliminated. No better illustration of its resurgent power could be offered than the controversies arising from the Calvo and Drago doctrines.² Recent studies of the foundations of state responsibility reveal the confusion arising from the effort to reconcile new developments with the older theories. In all realms of law, an increase of responsibility is apparent; and in harmony with this trend, manifest also in international practice, theorists have endeavored to account for the change. In so doing, two paths have been followed, starting from the original proposition of Grotius: the one attempting to include new fields of responsibility by widening the definition of fault; the other seeking to eliminate entirely the idea of fault, and to make responsibility objective.

§ 59. Grotius started with the famous old principle of the Roman Law: *Qui in culpa non est, natura ad nihil tenetur*. This rule he applied both to acts of the government through its agents, and to the acts of individuals. As to the former:

But if anyone be bound to make reparation for what his minister or

² The Report of the sub-committee considering Responsibility, of the Committee for the Progressive Codification of International Law, as has been seen, asserts the supremacy of international law, and yet approves the theories of Calvo. Consider also the theory of the equality of states, arising from independence, as exemplified in the procedure of international conferences and the process of international legislation. Upon "domestic questions," under the Geneva Protocol, see Fenwick, editorial comment, in *A. J.*, XIX, p. 143.

servant does without his fault, it is not according to the Law of Nations which is the point now in question, but according to the Civil Law, and even that rule of the Civil Law is not general: it regards only masters of ships and some others for particular reasons.³

As for the acts of individuals, the state can only become responsible through *patientia et receptus*:

A civil Community, like any other Community, is not bound by the act of an individual member thereof, without some act of its own, or some omission.⁴

With a wide allowance made for a variety of opinion as to what is meant by fault, it may be said that the majority of writers accept, in one sense or another, the idea that responsibility can not exist without fault.⁵

Even Grotius, however, found it necessary to hold the state responsible for acts which it could not have foreseen, by *patientia et receptus*, an assumed complicity. The conception of fault was still further extended by subsequent writers, who have assumed that the state is cognizant of, and responsible for, all acts committed

³ Grotius, *Rights of War and Peace*, Book II, Ch. XVII, XX, 2.

⁴ *Ibid.*, Book II, Ch. XXI, II, 1 and 2; and see Ch. XVII, XXI.

⁵ Grotius, as appears, considered that fault implies complicity. Fauchille, on the other hand, calls fault "ce qu'on fait sans en avoir le droit ou ce qu'on néglige de faire lorsqu'on devait le faire," *Traité*, I, p. 515. Benjamin says that guilt embraces premeditation and every negligence, and is excluded by accident or any other unavoidable element, *Haftung*, p. 22. "Les deux notions de 'violation du droit' et de 'faute' sont souvent confondues par les auteurs de droit interne. Pourtant, il s'agit la de deux concepts essentiellement différents," Decencière-Ferrandière, *Responsabilité*, p. 74. The confusion in the use of the term "fault" is discussed also by Triandafil, *L'idée de faute et l'idée de risque comme fondement de la responsabilité*, p. 18; and by Lapradelle-Politis, *Recueil*, doctrinal note on the *Alabama Case*, II, pp. 972-973.

Among writers who, in some form, assert that fault must precede responsibility, may be noted: Vattel, *Droit des Gens*, II, 6, § 73; Zouche, *Iuris et iudicii feialis*, II, Sec. 5, 1; Pufendorf, *De Jure Naturae et Gentium* (London, 1672), VIII, 6, § 12; Burlamaqui, *Principes du droit de la nature et des gens* (Paris, 1820-1821), IV, 3, § 20; Wolff, *Jus Gentium methodo scientifica pertractatum* (Magdeburg, 1749), §§ 314-316; Calvo, *Le Droit International*, III, § 1274; Piédelièvre, *Précis de Droit International Public ou Droit des Gens* (Paris, 1894), I, p. 319; Phillimore, *Commentaries*, I, CCXIX; Pradier-Fodéré, *Traité*, I, p. 335; Hershey, *Essentials*, p. 162; Oppenheim, *International Law*, I, § 154; Liszt, *Völkerrecht*, § 125; Bevilacqua, *Direito publico internacional*, I, p. 227; Benjamin, *Haftung*, p. 23; Fauchille, *Traité*, I, p. 515; Strupp, *Völkerrechtliche Delikt*, p. 45, who accepts it and calls it the ruling doctrine. For current discussion, see the debates at the 1927 session of the *Institut*.

It must be admitted, however, that because of the varying denotation given to the word 'fault,' the above grouping is of little significance.

within its jurisdiction.⁶ Resort has been had by other writers to another principle of Roman Law, in the effort to extend the definition of fault, by claiming a *culpa in eligendo* or *in custodiendo*. The state is at fault, that is, because it has chosen as its agents, or has failed to exercise proper supervision over, those whose acts have produced responsibility.⁷ Against this latter position Anzilotti raises certain objections. On the one hand, he says, the higher organs, which are precisely the ones of most significance in international relationships, either hold office through their own right, or are too high in power to be submitted to the vigilance of any other authorities of the state; while, on the other hand, granted the method of choice of agents in most states, a *culpa in eligendo* would be nothing more than a fiction. It would be impossible in practice to seek for such a fault in these higher officers, perhaps in the Constitution itself: the fault here is a *culpa qui inest in re ipsa*, a vice in organization for which the state as a whole must be responsible.⁸ To these objections should be added de Visscher's argument that international security would disappear if the state should be permitted to show that it was not at fault because the agent had exceeded his authority—an authority created by the law of the state itself, and limited according to its own desires. Since the acts of the agent are for the benefit of the state, and not for personal motives, the state should be prepared to assume the consequences of these acts.⁹

Similarly, the theory of fault has been extended to include acts of individuals through complicity or negligence upon the part of the state. The act of the individual is not the act of the state; nevertheless, since it is the duty of a state to restrain injurious acts emanating from those under its control against aliens or foreign

⁶ "Foreign nations have a right to take acts done upon the territory of the state as being *prima facie* in consonance with its will; since, where uncontrolled power of effective willing exists, it must be assumed in the absence of proof to the contrary that all acts accomplished within the range of the operation of the will are either done or permitted by it," Hall, *International Law*, p. 64.

⁷ "Solche völkerrechtliche Schuld ist gegeben, wenn der Staat bei Auswahl der Beamten und Organe, die den anderen Staat oder dessen Bürger schädigen, nicht sorgfältig vorgegangen ist," Hatschek, *Völkerrecht*, p. 386; and see Triepel, *Völkerrecht und Landesrecht*, p. 349; Benjamin, *Haftung*, p. 46.

⁸ Anzilotti, in *R. D. I. P.*, XIII, pp. 287-290. "Exiger une preuve précise de la culpabilité des chefs du gouvernement équivaldrait dans la plupart des cas à supprimer le droit d'indemnité," Bar, *loc. cit.*, *R. D. I. L. C.*, 31, p. 473.

⁹ De Visscher, *Responsabilité*, p. 92 *et seq.*

states, its failure to prevent such an injury makes it responsible for the damage done by the individual. This argument may be carried to the extent of assuming the complete power of the state to prevent the injury, and of regarding the state as therefore responsible from the moment the individual commits the injury. On the other hand, there are writers who, abandoning the attempt to expand the idea of fault to such a degree as to keep pace with advancing social concepts, have endeavored to eliminate fault entirely, and to substitute therefore an objective responsibility on the part of the state. Triepel was the first to attack the Grotian theory of complicity. While the individual, not being a subject of international law, cannot himself violate that law, the state may do so by failing to restrain the act of the individual. But in this case, says Triepel, there is no question of fault; the state is responsible for its own acts. *A fortiori*, if the state is responsible for such acts, it is clear that it is responsible for the acts of individuals which it makes its own—that is, for the acts of its agents. And this is true even for acts beyond the competence of the agent; for one must attribute them to the state which, by giving to him the power, has permitted these acts to be done under the aegis of the state.¹⁰

These beginnings were carried to an extreme by Anzilotti. Since the state (he argues) can act only through its agents, the question is whether the fault of the agent is necessary that an act objectively contrary to international law may be imputed to the state and engage its responsibility. This question must be answered in the negative. In practice, when an agent acts beyond his authority, the state is nevertheless held responsible; and thus, the personal volition of the agent being laid aside, no question of fault can exist. That this situation is found is due to the fact that all security in international intercourse would be lacking if a state could evade responsibility by alleging that the act of its agent was not authorized by its own laws. Foreign states must be protected against such a danger; and therefore the state must be responsible for even the *ultra vires* acts of its agents. The state rules as it sees fit the attributes and activities of its agents, but always under the condition of guaranteeing other states against any injustice arising from that system. With regard to the individual (he continues) who has no

¹⁰ Triepel, *Völkerrecht und Landesrecht*, p. 324 *et seq.*

connection whatever with international law, the state is obligated, not to prevent his acts, but merely to use a certain vigilance to prevent them. It would not, then, be responsible if the act occurred, but only if it failed to use due diligence to prevent its occurrence; and this lack of diligence is in itself a violation of international law, not a fault.¹¹ In either case, then, it is the state itself which has violated international law, and its responsibility, whether for an agent's or an individual's act, is for this illegality rather than fault. Anzilotti thought that he had eliminated fault from consideration, and had made responsibility purely objective.¹²

Subsequent writers, however, have not been able to follow Anzilotti to this extent. By pursuing his reasoning to a certain degree, Schoen concludes that pure *Erfolgshaftung* is not unknown to international law. But this, he says, does not mean that Anzilotti is correct when he asserts that *culpa* is not known to international law: on the contrary, there are many cases in which responsibility can enter only through fault. Such cases may appear as a result of omission on the part of the state to prevent injury by its subjects against another state. Both practice and conventional law recognize that, in these cases, fault, i.e., lack of due diligence, must be established. His conclusion is that fault must be taken into consideration with regard to acts of individuals, but that elsewhere responsibility is objective.¹³ Strupp agrees with Schoen that *culpa* can not be thrown overboard as Anzilotti would have it, but goes farther than Schoen in permitting fault to be urged.¹⁴ He differentiates between acts of commission and acts of omission: for the former, responsibility is immediate, but for the latter the element of

¹¹ "Non la colpa, ma il fatto contrario al diritto internazionale lo obbliga; solamente, il fatto contrario al diritto internazionale non sorge dall'azione dell' individuo, ma dal contegno dello stato riguardo all' atto compiuto dal privato," Anzilotti, *Teoria*, p. 172-173. See Lapradelle-Politis, *Recueil*, II, p. 973.

¹² "Nous pensons, quant à nous, que la théorie de la faute doit être ici mise absolument hors de cause," Anzilotti, in *R. D. I. P.*, XIII, p. 287.

¹³ "Eine culpa ist Voraussetzung nur für die Haftpflicht, die dem Staate eventuell aus seinen Nichteinschreiten gegen Private erwachst, im übrigen haftet der Staat schon aus dem objektiv rechtswidrigen Verhalten seiner Organe," Schoen, *Haftung*, p. 62. See, generally, on the subject of fault, *ibid.*, pp. 51-63.

¹⁴ "Unserem Resultate kommt am nächsten Borchard 213 ff. und neuestens Schön 54, der sich zum Culpaprinzip in der Fällen bekennt 'in denen ein Staat haftbar gemacht wird, weil er keine Verkehrungen getroffen hat, die Verletzung anderer Staaten durch seiner Untertanen zu verhindern oder weil er von diesen begangene Verletzungen nicht gehandelt hat.' Dass diese Auffassung zu eng ist beweisen die früher gegeben Zitate." Strupp, *Völkerrechtliche Delikte*, pp. 48, and 53, note 3.

fault, which means negligence, must be taken into consideration.¹⁵

§ 60. The expansion of the principle of responsibility is accounted for by the growth of international law itself. Since the state possesses, under that law, exclusive control over individuals within its territorial limits, it must accept in full the responsibility which international law assesses against it for their actions. As a matter of fact, international law does not hold the state responsible for everything that occurs within its boundaries, though the growth of responsibility points in that direction. It is not necessary to assume, as does Hall, that all acts occurring within a state are *prima facie* in consonance with the will of the state. Whether they are or not, the sole responsibility of the state is for such acts as international law regards as illegal and productive of responsibility. The mere imputation to the state of an illegal act at once engages the responsibility of the state; but it is not to be forgotten that the extent of the obligation put upon the state is, usually, merely to use a proper diligence in preventing acts of individuals or in redressing them. The lack of such diligence may perhaps be regarded as fault; but it is the employment of such private law concepts as this which has produced so much confusion as to responsibility in international law. The sovereign power which the state is able to exercise over individuals within its domain is not to be compared with any possible relationship between individuals under civil law. The cases are quite different; and responsibility in international law must be explained by its own development and practice.

As a matter of fact, the theories which may be built up behind international responsibility are, after all, of little importance in the actual decision of the case. That decision will be the same whether one says that the state is responsible only for its own acts and never for those of individuals, and then imposes a duty of due diligence upon the state of preventing injurious acts by individuals; or whether one says that the state is a guarantor against acts within its control injurious to aliens and then diminishes, even perhaps to the vanishing point, its actual responsibility through the proper

¹⁵ "Völkerrechtliche Delikt ist eine von einem Staate ausgehende, die Rechte eines anderen Staates verletzende Handlung, die nur dann auf staatliches Verschulden zurückzuführen sein muss, wenn ein staatliches Unterlassen in Frage steht," Strupp, *Völkerrechtliche Delikt*, p. 60.

operation of its domestic machinery of redress. The tendency of practice seems to point to the latter alternative; but the criterion must always be whether, in a given set of circumstances, the state has itself violated or failed to meet an obligation placed upon it by international law. Once this appears, responsibility is established, whether the next step be resort to local courts, or diplomatic interposition.

Certainly responsibility may not be rested upon fault in the selection of state agents. The obligation put upon the state by international law is an absolute one; and it is unnecessary to show that the state has been careless in the choice of its agents. The state is left free to create or authorize such agents as it may desire, but always upon condition that they may be able to meet its international obligations. If these obligations are not satisfied by it, no question can be raised as to fault in the selection of its agent; the state can not plead that it was not at fault and therefore not responsible. It is for the state to find a more effective system. It is in complete control of these agents, which can not be reached by other states. It alone has given them their power to injure; and it must accept responsibility for any injuries occasioned through the exercise of this grant of power.¹⁶

§ 61. The apparent differentiation in practice in assigning responsibility for various acts has led to a distinction on the part of many writers between direct and indirect responsibility.¹⁷ This distinction is between acts of the state itself, through its authoritative organs, and acts of individuals. For its own avowed act, the state is regarded as directly responsible; but its responsibility for the acts of individuals is indirect, and conditioned upon fault. This position is stated by Hershey as follows:

¹⁶ See Strupp, *Völkerrechtliche Delikt*, p. 47; Schoen, *Haftung*, pp. 51-53; Bar, *loc. cit.*, R. D. I. L. C., 31, p. 473; Anzilotti, *Teoria*, p. 169; Decencière-Ferrandière, *Responsabilité*, pp. 79, 81; Article 1, Resolutions of the *Institut*, 1927, Appendix III, *infra*; and also its discussion under date of August 25, 1927.

¹⁷ According to Schoen, this is the ruling doctrine, Schoen, *Haftung*, p. 35. He cites: Liszt, *Völkerrecht*, § 25, II and III; Gareis, *Institutionen*, p. 215; Ullman, *Völkerrecht*, p. 148; Oppenheim, *International Law*, I, pp. 149, 150; and "nicht in gleicher weise scharf formuliert, aber der Sache ebenso," Bluntschli, *Völkerrecht*, § 466; Rivier, *Principes*, II, p. 41; Calvo, *Droit International*, §§ 1263, 1271. See also Borchard, *Diplomatic Protection*, p. 180; Bevilacqua, *Direito Internacional*, I, p. 170; Heilborn, *System*, p. 407; Benjamin, *Haftung*, p. 46; Fauchille, *Traité*, I, p. 517; Fiore, *International Law Codified*, § 594; Buxbaum, *Völkerrechtliche Delikt*, p. 13; Decencière-Ferrandière, *Responsabilité*, pp. 61-62.

A State is *directly* responsible for its own actions or for acts of its officials and agents performed at its command, or acting under its authority. State acts which violate international law, or inflict injuries upon other nations constitute serious international delinquencies, if committed wilfully or as a consequence of culpable negligence. . . . In ordinary times a State is also *indirectly* responsible for the ordinary and law-abiding conduct of all those residing or domiciled within its jurisdiction and subject to its laws.¹⁸

Recent writers have tended to attack this classification, basing their arguments upon the conviction that the individual is unable to violate international law. Since, they say, state can deal only with state, and international law can not impose duties upon individuals, liability must always be direct. The act of the individual, they argue, can only *occasion* responsibility; and the responsibility thereby engendered is not for his act, but for the failure of the state to prevent or punish it. This failure on the part of the state is an international delinquency of the state itself, for which it is directly responsible. Thus, responsibility for acts of individuals is entirely eliminated; and international law has no longer to concern itself with such acts, except in so far as they reveal the state itself in a delinquency.¹⁹

Some confusion of thought arises from such a distinction. If the distinction between direct and indirect responsibility has reference to substantive responsibility, one may agree with Anzilotti and his followers that the state is responsible only for its own acts, and that, therefore, responsibility is direct.²⁰ If, however, those who distinguish between direct and indirect responsibility have in mind the method by which responsibility may be claimed or discharged, it may be accepted. But in the latter case, it is not a substantive, but a procedural, matter. When foreign offices deal directly with each other, one may speak, procedurally, of a direct responsibility; but where, as is true in most cases, the rule of local redress applies,

¹⁸ Hershey, *Essentials*, pp. 161-162.

¹⁹ "Jeder hat nur für seine eigene Tat (Handeln oder Unterlassen) einzustehen, das Individuum für die seine, die Staate für ihre," Muszack, *Haftung*, p. 38. See similarly Strupp, *Völkerrechtliche Delikt*, p. 35; Schoen, *Haftung*, p. 40; Anzilotti, *Teoria*, p. 172.

²⁰ Since the state can act only through its agents, it would probably be more correct to say that responsibility is always *indirect*.

According to the writers cited above, indirect responsibility appears only for the acts of other states. See Chapter II, *supra*.

the procedure is indirect in the sense that the operation of domestic agencies intervenes before direct diplomatic action between states is permissible. It is not correct, however, to say that no responsibility exists until the state of the alien has made its national's claim its own; and the problem is not solved simply by saying that the acts of the state, through its higher agents, fall upon one side of a line, and acts of minor officials and individuals upon the other side. Practice affords no support for such a position. In innumerable cases, the responsibility of the state is discharged merely by the operation of its municipal provisions for redress, though, under the classification of Anzilotti and his supporters, such acts would never have involved responsibility at all, because they had never reached the stage of direct diplomatic procedure between states. On the other hand, some acts of individuals may call for emphatic diplomatic action and perhaps for pecuniary indemnity, without awaiting local redress, as in cases of insults to the honor of foreign states.

The distinction is important as a matter of procedure; but it has no relevancy whatever in establishing responsibility in principle. Responsibility appears from the moment of the commission of an internationally illegal act by the state; and the relationship of the state to the party by whom the act is committed, or to the state which is injured, is always direct, or, perhaps, always indirect. That the case never becomes a matter of discussion between two states is not sufficient to support the assertion that responsibility has therefore never existed. International law sets certain obligations: if these are not met, responsibility exists, whether such responsibility is discharged by reparation made directly to the other state, or is discharged by the ordinary action of municipal justice, the injured state never perhaps being cognizant of the existence of the injury.

§ 62. From the investigation made in the foregoing chapters, two seemingly divergent forces appear. On the one hand, the state has been more and more subjected to international law in the sense that it may be called to account by other states for a greater variety of injuries for which it is responsible, and to a greater degree of reparation. But if, in this respect, the law of nations appears to exercise a greater degree of supervision over the state, on the other hand, the control of the state over its own territory has been enlarged by the more rigid application of the rule that local machin-

ery of redress must be respected. The two tendencies are not in opposition to each other: on the contrary, they represent a characteristic development of international law.

In the building of this law, as is revealed in the word 'international' itself, there has been manifest a desire to secure its objects through co-operation among states rather than by the submission of states to a superior authority. The degree to which international law has been effectively enforced through methods of co-operation is remarkable. States have been left to organize in their own ways, and to administer international law within their territories according to their own methods. There is no more firmly established rule of international law than that, where local remedies have been instituted by a state, an attempt must first be made to secure redress through their agency. It is solidly founded in the practice of states, and needs no Calvo Doctrine, nor theory of sovereignty, to support it. So long as the state itself can furnish just redress for injuries within its jurisdiction, there can be no appeal from it to a higher authority. But this does not mean that the state is left irresponsible in the provision of an adequate machinery. It is desirable to leave to the state the settlement of issues which might become dangerous between nations; but the state can not be left as the final judge of whether it has satisfactorily measured up to its international obligations. An international standard is set for the administration of its duties; and, in the enforcement of this standard, the supremacy of international law over the will of the state is exhibited, and the healthy growth of the law is provided for. It is impossible to concede, and it is not conceded by states in actual practice, that a state may define for itself what constitutes internationally illegal conduct, or that it may set the conditions under which a foreign state may interpose for the protection of its rights or those of its nationals.²¹ Neither in theory nor in practice is a national desire to depart from the international standard permitted to prevail over the irresistible forces resulting from the interde-

²¹ It is in this respect that the recommendations made to the Committee for the Progressive Codification of International Law, concerning the responsibility of states, would, if accepted, constitute a serious setback to the growth of that law. With a proper recognition of the dominant position of international law above all other law, this report at the same time excludes positively any supervision over the administration of justice within a state. It is obvious that if the state may deal out justice as it desires, international law is rendered quite impotent in the protection of aliens.

pendence of states. Above all reservations made by the states rises the superior force of the standard set by the law of nations.

Unfortunately, that standard is not clearly stated, nor is there any impartial authority either to determine it, or to enforce it. Under present conditions, it is therefore quite possible that a weak state may be abused by a stronger one; and it is in reaction against such injustice that the Latin-American states have fought so strongly for their limited conception of national responsibility. The chief need of the principle of responsibility to-day is a clearer statement of the rules of international law, a more precise definition of what obligations the state has under that law. The problem is not so much due to the fact that states refuse to respond to their obligations, as that they are unable, in many instances, to agree upon what those obligations are. Upon the one hand, the rules of general international law are often deficient. If they could be stated with accuracy and precision, there would be less occasion for dispute: states would then be able to agree upon the application of the rule. On the other hand, more exactitude as to the international standard for the administration of internal justice is essential. It is now too easily possible for a strong state to assert that its own justice is quite satisfactory, while that of its weaker neighbor does not measure up to the requirements of the international community.

Almost equally pressing is the need for better agreement upon the measures which states may employ in the assertion of their rights against other states. If the ordinary processes of local redress and diplomatic negotiation or arbitration prove of no avail, a claim may be pressed by the injured states through measures of force and, ultimately, war, and perhaps conquest. In none of these methods, unless possibly in an arbitration submitted to the Permanent Court of International Justice, is there any assurance that a decision will necessarily be handed down upon a judicial basis, and in strict application of the law of nations. The action taken is voluntary; the law may be enforced, or it may not be. And, in the measures of enforcement, the smaller state is at a great disadvantage, with the possibility of being deprived, through the superior might of its adversary, of that equality which at the least all states may claim—an equality of rights before the law.

But, unsatisfactory as the present sanctions of international law may be, and however great the aggressions which may be perpe-

trated in abuse of them, they can not be discarded until other and more effective machinery is provided. The present interdependence between states necessitates intercourse between them; and there must be rules for the protection of this intercourse. While the outcries against imperialistic aggrandizement are perhaps often justified, it must be impressed upon the mind that, abuses aside, the enforcement of just liability means the reign of law. If reform of abuses is desired, it should not be sought in passive submission to injuries with consequent emboldened irresponsibility on the part of the injuring state, but in the provision of more efficient machinery for the enforcement of international responsibility. Hope of improvement lies in impressing upon states the need of a greater respect for international law. The fact that a strong state can and often does take advantage of the weaker state is no reason for permitting the weak state to go unpunished for violations of international law. Respect for international law is not enhanced when any state, however weak or unimportant, violates international law with respect to any other state. It is much to be desired, even in the face of open abuse, that a state should interpose for the protection of its legal rights and in the interest of the community of nations and its law, whenever it has just cause and other means have proved vain. The United States has often done so; and if at times her methods have aroused criticism, her purposes and motives have usually been worthy. Such actions are not necessarily to be regarded as essentially nationalistic or aggrandizing in character, simply because in some cases misuse has been made of legal rights. Any weapon may be perverted to unworthy purposes. Intervention has often been used for selfish purposes in the past, and the word has acquired an opprobrious connotation, dating from its misuse by the so-called Holy Alliance; but international law can not afford to discard, for that reason, what is practically the only weapon in its possession for the enforcement of responsibility. It would be as absurd to deprive the policeman of his revolver because revolvers have at times been misused by thugs. As between responsibility, even though imperfectly administered, and a complete irresponsibility, there is no question of the choice; but it is much to be desired that the decision as to the liability of the state in a particular instance, as well as the enforcement of the decree against it, should be committed to better organs of the community of nations, acting

through impartial machinery, rather than to the selfish disposition of the injured state.

§ 63. If one raises the question as to how international responsibility shall be better determined and enforced, one is at the outset confronted with the question as to whether it should be continued upon the same basis as before, or whether a centralized international organization should be set up with supervisory powers over and above the individual states. The mere fact that international law has been as well obeyed as municipal law, in spite of the lack of a superior coercive power, need not be regarded as satisfactory proof that it will continue to operate successfully. As states become more and more dependent upon one another, the enormous increase of difficulties and problems connected with their intercourse is placing a burden upon the ancient structure of international law which it is proving unable to support. It is obvious that the deficiencies of international law are being recognized, and that efforts at rectification are being made. It is not yet apparent, however, whether these developments will follow the customary trend of political organization as between individuals, culminating in a supreme authority for the interpretation and enforcement of international law; or whether a new system is in process of invention through which states, while reserving their independence of action, and rejecting a common superior authority, would still be able to co-operate effectively against internationally illegal acts. In either case, it would appear that the former conception of a responsibility merely to the injured state is losing ground, and that there is being built up the idea of a responsibility to the entire community of nations. Such a tendency would be of great importance in the development of the principle of responsibility, and merits some attention.

It has been said, *ubi societas, ibi jus*; and it may equally be said, *ubi ius, ibi societas*. Of the existence of a community of nations, united by mutual interests and binding obligations, no proof need be offered. Behind it is the mighty force of interdependence, for the most part economic, but social and otherwise as well. So closely is it knit together that the illegal act, or general irresponsibility, of one state becomes a matter of concern to all. The disordered situation of a Russia, or a China, is felt within each member of the society of nations; and its inability or unwillingness to meet its

international obligations affects the interest of the members of the group not only individually, but collectively. It is to be expected, then, that the community of nations should take action in protection of its collective interests. For this purpose, by a painfully slow process of evolution, there has appeared a rudimentary sort of international government. It would obviously be not *à propos* to discuss this development here; but it may be pointed out that the community of nations is capable of formulating law, and does so; that institutions exist by which this law may be judicially interpreted; and that in addition to the League of Nations, which must, thus far, be regarded as a collateral agency rather than as the capstone of the edifice, it possesses an administrative system whose range is little appreciated.

Such institutional developments do not, however, offer a true measure of the extent to which community interests have superseded national particularism. In this community, the state is a unit, but no longer a supreme principal. Internally, it must submit to the will of its members; externally, to the will of the community of nations. Throughout its entire organization, it is permeated by the law of nations; and it must enforce that law within its bounds. Thus, international law reaches down to the individual, who is the true base of any law, municipal or international. It is for his interest, singly or collectively, that laws exist. For the protection of his interests, as a member of a particular group, the whole machinery of diplomatic and other international intercourse is provided. His rights can be protected only through his state; but, in this process, the state is his representative, and not an end in itself. International law protects him abroad; and it may, though it rarely does, protect him within his own state. If he has no standing before international courts, it is not because his rights are not recognized by them, but because of the greater facility and convenience with which such cases can be handled with his state to represent him.²²

²² The Central American Court of Justice permitted individuals to bring suits against states before it, and heard such cases, *Anales de la Corte de la Justicia Centroamericana*, Vol. III and IV. The *Mavromattis Case* shows how the rights of individuals may be protected before the Permanent Court of International Justice. In the discussions of the Advisory Committee of Jurists concerning the organization of this Court, many pages are devoted to the question of whether individuals should be given a status before it. M. Lapradelle argued, for instance, that the Court should take

This recognition of the paramount importance of the individual gives a broader basis for international law; and the pressure of that law in behalf of individuals is tending toward such a uniformity of standard in domestic laws that he may more and more expect to receive a fixed minimum of rights and protection no matter where he goes. The necessity of maintaining domestic laws in harmony with the requirements of international law is no longer questioned.²³ The state which finds itself unable, through the inadequacy of its own law enforcement, to meet its international obligations, finds itself put under certain restrictions. This is revealed upon the one hand, in the extraterritorial jurisdiction long wielded by the more civilized states in certain Oriental countries;²⁴ and, on the other hand, by the intervention of the United States, and of other states in similar situations, in certain Latin-American countries in which the rights of aliens had been consistently disregarded.²⁵ These obligations bear equally upon the more advanced states. Certain specific legislation must always be provided, such as laws protecting ambassadors against attack, or providing for the proper execution of treaties. Much more far-reaching is the effect of the rule of local redress, with its concomitant rule of due diligence. In general, while the rule of local redress leaves to the state almost complete autonomy, its constant wearing effect tends

jurisdiction in cases of denial of justice; and M. Loder that it was not the intention of the League of Nations to limit the competence of the Court to states, *Procès-Verbaux*, pp. 204-217; and see Phillimore, in *B. Y. I. L.*, 1922, pp. 80, 150. Note also the debates over the unratified provision of The Hague Conference of 1907 for a Prize Court, *Actes et Documents*, II, pp. 787-791. According to Ralston, "the claimant before an international tribunal is ordinarily the nation on behalf of its citizen," and the state has no claim of its own, *Law and Procedure*, § 412 *et seq.*; and see the *Case of the North American Dredging Co.*, General Claims Commission, U. S. and Mexico, Docket No. 1223, Sec. 19. See also the suggestions offered by Mr. Borchard, in *A. J.*, XXI, pp. 303-306; and note the attempt of M. Politis to have the rights of individuals as against states recognized by the *Institut* (1927).

²³ On this subject consult Wright, *Enforcement of International Law through Municipal Law in the United States* (Urbana, 1916); Picciotto, *The Relation of International Law to the Law of England and of the United States* (London, 1915); Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899).

²⁴ "Countries yielding such jurisdiction have been alert to perceive this, and to endeavor to rid themselves of such a mark of inequality; and this has been true whether or not their existing judicial systems were essentially inapplicable to aliens and their affairs, or insufficient to render justice with respect to them," Hyde, *International Law*, I, § 265; also § 259; and Hall, *International Law*, p. 60 and note.

²⁵ "Under such circumstances the State forfeits the right to complain if a foreign power or group of powers which have suffered direct injury from its misconduct resort to intervention," Hyde, *International Law*, I, p. 123; and see pp. 118, 121.

to secure uniformity of standard and at times of process.²⁶ Further, conventional agreements, many of them universal in scope, even when bilateral in form, produce frequent changes in domestic law, for the purpose of bringing the latter into uniformity with the international agreement. Such agreements as those for the repression of the slave trade, or for postal service, or for more satisfactory communications between states, may be suggested. The treatment of a pirate would be much the same in every state. The effect of extradition treaties, without yet having built up a rule of law outside of conventions, is a tendency toward a common understanding of types and standards of crimes and penalties.²⁷ This law is in process of formation; as is also, though without great advance as yet, the law of nationality.²⁸ The rules of private international law, while not a part of international law proper, give to individuals some expectation, based upon mutual understandings between states, of treatment along agreed lines of adjustment.²⁹ The apparently growing tendency toward depriving crime of its territorial character, and permitting a state to try an alien for a crime committed abroad, whether it be regarded as expedient or not, seems to point toward an effort to get all states behind a common justice for the individual.³⁰

²⁶ See, for example, the French law above mentioned taking cases out of the hands of juries; and similarly, recommendations in the United States (unfortunately not yet followed) that cases involving aliens be put under Federal jurisdiction. The Act of Anne in England, or the extension of the Habeas Corpus Act in the United States after the *McLeod Case*, offer further illustration. See Hyde, *International Law*, I, § 291.

²⁷ Fenwick considers that the extension of extradition depends upon the "growth of a more uniform system of criminal law and a moderation of the present exaggerated sense of the protection due from a state to its citizens," *International Law*, p. 218, note 1. See Hyde, *International Law*, I, § 310; Fauchille, *Traité*, I, pp. 413-414.

²⁸ Questionnaire No. 1 of the Committee of Experts for the Codification of International Law makes recommendations with regard to a law of nationality. See Anzilotti, in *R. D. I. P.*, XIII, p. 15, who says that the law of nationality is in process of formation.

²⁹ "Private international law is not however a part of international law proper," Hall, *International Law*, p. 59. Despagne, however, asserts that the conflict of penal laws belongs to public international law, *Cours*, p. 363. "Tout groupement, tout état qui contribue à assurer le cours de la justice pénale dans un autre pays ou groupement, agit non seulement dans l'intérêt générale, mais aussi dans son intérêt propre et remplit une obligation morale internationale," Travers, *Droit International Pénal* (Paris, 1920-1925), V, p. 538.

³⁰ Hall quotes, though not with favor, the statement of Woolsey that the principle of the territoriality of crime "is not founded on reason, and that, as intercourse grows closer in the world, nations will more readily aid general justice," Hall, *International Law*, p. 262, note 1. See also p. 264, where he quotes the *vœu* of the

§ 64. If, as has been seen, the regular movement of individuals between different states is of so much importance to the community of nations that it is becoming necessary for the community to build up a law common to individuals wherever they may be; and if, as has also been suggested, the irregular conduct of a state is a menace not only to one, but to all, members of the community, it would seem that the community as a whole would take an interest in the enforcement of responsibility against the state guilty of internationally illegal conduct. If the task of enforcing responsibility is left to the injured state alone, it must be obvious that that state will often be incapable of securing its rights under international law, with consequent injury to the entire community of nations. If, in other words, there is a community having an interest in the enforcement of rules which are of value to the community, it would seem proper that the community, as is the case in national organization, should join forces for the execution of those rules.

As a matter of fact, it is at this point that international law, and consequently the principle of responsibility, is at its weakest. With its present system of sanctions based upon self-help, it is in a stage of development analogous to that characteristic of England in the days of the *wergeld*. The analogy, Pollock suggests, needs to be carried on in future development:

Two principles appear standing out in the Common Law as it begins to come to its strength in the twelfth and thirteenth centuries: the stern condemnation of self-help, and the duty of every man to give aid in keeping the peace. Applied to the law of nations, these principles would go far to prevent war.⁸¹

There can be no doubt that joint action for the support of international rights and for the enforcement of international duties, is quite legal, even on the part of states not themselves directly injured.⁸² Such action is, however, entirely voluntary with states. International law says 'may,' not 'must,' with regard to the share

Institut de Droit International at its 1883 meeting. Of course pirates, and doubtless slavetraders, are now subject to the jurisdiction of any state. The Washington Conference of 1922 agreed to treat submarine officers, acting in violation of the rules therein laid down, as pirates, *A. J.*, XVI, p. 260.

⁸¹ Pollock, "Cosmopolitan Custom and International Law," *Harvard Law Review*, 29, p. 569.

⁸² "When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, to hinder

of states in enforcing it.³³ There are no crimes against the community of nations which call for the action of the community as a whole against them. The injured state is not able to feel assured of any support for its cause beyond its own might, when matters have passed beyond the usual stages of adjustment.

There is evidence, however, of the growth of a belief that a violation of international law produces a responsibility to the society of nations as a whole; or rather, of a feeling that it is the duty of that society to take joint action against the state which is guilty of an illegal act. Theoretical statements, or *dicta* to that effect, are frequent.³⁴ Ward quotes Vattel that the failure to punish the murderers of the French ambassadors was an atrocious attempt against the Law of Nations, on account of which Francis I had the right not only to make war against the Emperor, but "also to demand the assistance of all other nations in its support."³⁵ In the famous case of *Respublica v. Longchamps*, the court declared:

The *person* of a public minister is sacred and inviolable. Whoever offers any violence to him not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world.³⁶

In a more modern case, an English Prize Court speaks of a violation of international law so grave as to menace the rights of all nations, and to put one in the presence of a true case of international solidarity.³⁷

In the actual practice of nations, some slight steps have been taken in recognition of the interest of the entire community in the

the wrong-doing from being accomplished, or to punish the wrongdoer," Hall, *International Law*, § 12, p. 65; and see Hyde, *International Law*, I, §§ 71-75.

³³ Fenwick, *International Law*, pp. 46, 303; Schoen, *Haftung*, p. 67.

³⁴ Strupp remarks that if there is no such thing as a crime against the community of nations, "es fehlt in der Tat nicht an Schriftstellern." He himself denies the existence of such a crime. *Völkerrechtliche Delikt*, p. 14.

"The obligation of states is not limited to the mere negative one of not doing harm to others but as members of the family of nations they owe at least a moral duty to that society to take measures to promote its general welfare. . . . Duties of this character are for the most part in a process of becoming, rather than being already established law," Wright, *Enforcement*, p. 87. See also Bluntschli, *Völkerrecht*, No. 471; Pillet, in *R. D. I. P.*, V, p. 83; Hyde, *International Law*, I, p. 118.

³⁵ Ward, *History of the Law of Nations*, II, p. 557, quoting Vattel 4.7.84. He quotes as against Vattel, Grotius, 2.18.5.

³⁶ Moore, *Digest*, IV, p. 622.

³⁷ *Case of the Stigstad*, Grant, *Prize Cases*, III, p. 385.

adjustment of disputes. The right to tender good offices may be so regarded; and joint diplomatic action has been frequent.³⁸ Collective intervention has often been used; and, when employed in support of a legal right, is to be regarded not only as a means of enforcing responsibility, but, among existing means, as one of the best. Intervention is almost the only weapon through which responsibility may be ultimately enforced; and when it is administered in the name of the community, or even of a group within the community, it is far more apt to be just and effective than when carried out by the interested state alone. It is doubtless true that rights have been as grossly violated through collective action as through intervention by single states; but unquestionably such action must be regarded, if exercised under legal authority, as productive of far greater impartiality, and as affording less opportunity for selfish aggrandizement. Mr. Hyde remarks, in this connection:

At the present day there is evidence of an increasing disposition, on the one hand, to assure respect for acknowledged rights of political independence of each member of the family of nations, and, on the other, to facilitate united efforts to intervene when a particular State definitely abuses those rights. It is the mode of collective interference, through an established agency, as well as the recognition of circumstances when such action is excusable, which characterize the existing tendency and afford hope of a sounder practice than has hitherto prevailed.³⁹

A rule of absolute non-intervention would emasculate international law, and can never be admitted. Intervention should, however, be so regulated that it may never be employed except in defence of a legal right; and the vice which has brought it into disrepute, the possibility of its being misused for selfish national purposes, should be eliminated by permitting its use under the authorization of the community of nations only.

The administrative direction assumed by the international com-

³⁸ "Within its limited scope, therefore, the right to tender good offices or mediation represents an inchoate sense of collective responsibility on the part of the community of nations as a whole for the maintenance of peace," Fenwick, *International Law*, p. 402. For examples of joint diplomatic action, see Moore, *Digest*, VI, § 917.

³⁹ Hyde, *International Law*, I, p. 118; and see §§ 72-75, *ibid.* The entire community should be represented in such machinery, if proper impartiality is to be secured. See *ibid.*, p. 123. The entire discussion of intervention by Dr. Hyde is characterized by a practical realization of the needs of the community of nations.

munity at various times in the past may also be regarded as indicative of a feeling of joint obligation for the welfare of that community. The conduct of Turkey has been in great part controlled by the concerted action of the great states of Europe until the present day. Indeed, the directive function of the Concert of Europe has long been recognized; and no important European, or even world, question, could be settled without its action. Thus, Serbia was in 1908 forced to pledge to the Powers—not to Austria alone—that she would no longer conduct a campaign of intransigency against Austria; and, in the adjustment of the Moroccan question, both England and Germany refused to be excluded. More recently, these functions have been continued by the Conference of Ambassadors, to whom, for example, Greece was held responsible for the murder of General Tellini, rather than to Italy alone.⁴⁰ Apparently, the functions of this body have now been transferred to the Council of the League of Nations, to which more formal authority has been given to act for the community, by the Covenant contained in the Treaty of Versailles. In various instances, of which the Greco-Bulgarian controversy is perhaps the most instructive, the Council has intervened in the interest of the society of nations. A large number of administrative unions are in existence, with functions too numerous to mention, but all administering a common interest for the benefit of the community.⁴¹ There may be offered, as a final illustration of this feeling of the necessity, even in some cases the duty, of collective action, the conception of trusteeship found in the mandate system instituted under the League of Nations for the territories taken from Germany and her cobelligerents.

Since the last great war, there are further evidences that the sense of a community obligation is struggling to find expression in international organization. The demand for the outlawry of war, which implies group action, as also suggestions for the elimination, or, on the other hand, the increase, of neutrality in war, illustrate this effort.⁴² The establishment of the League of Nations and of

⁴⁰ This case was fully discussed in Chapter VIII, pp. 187-188, *supra*.

⁴¹ See Sayre, *Experiments in International Administration* (New York and London, 1919); Reinsch, *Public International Unions* (Boston, 1911); Potter, *Introduction to the Study of International Organization* (New York, 1922).

⁴² In the *Case of the Stigstad*, the English judge remarked: "Neutrals, whose principles or policy lead them to refrain from punitive or repressive action of their own,

the Permanent Court of International Justice may be regarded as the turning point in the struggle for the assumption by the society of nations of the duty of securing a just and adequate application of the Law of Nations. It must, however, be admitted that such a duty may not yet be recorded as a principle of international law, since not all states have given their approval to these institutions. It can not yet be said that, under international law, a state guilty of internationally illegal conduct toward another state will be held responsible to the community of nations, or that that community will feel itself under a legal obligation to enforce responsibility against such a state. The trend of development seems, however, to be unmistakably toward the joint and organized action of the community of nations as a sanction for the enforcement of the international responsibilities of states.⁴³

§ 65. As a final word, it should be emphasized that the process of development above described is inevitable. The necessities of human and international intercourse account for the establishment of every existing rule of international law; and the pressure of interdependence, now greater than ever, will, without question, result in a further expansion of the principle of responsibility. Here, again, as has already been proved irresistibly true within the state, the social interest of the group must inevitably dominate the interests of individual members. States may as well recognize the existence of this force by common action to secure a legal basis for its use; for otherwise responsibility will be enforced by physical might, according to the desires of the state which is capable of imposing those desires upon less fortunate members of the society of nations. The backward state can not be allowed to stand as an obstacle in the path of this development; and if it be argued that such an attitude lends itself to imperialistic purposes, the reply is that retrogression is impossible. If abuses are to be avoided, it can only be

may well be called upon to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas," Grant, *Prize Cases*, III, p. 385. As to the "Outlawry of War," see Wright, in *A. J.*, XIX, p. 76.

⁴³ The practical effect of the League of Nations will be felt by all states, whether members or not. The Geneva Protocol and the Pact of Locarno represent a further advance toward the objective above mentioned. On the other hand, it should be noted that the League lacks power to utter a command; and that the absence of certain powerful states from its membership, as well as the interpretation of its Covenant in recent years, reveal a hesitancy on the part of nations to assume obligations further than those with which they are now bound.

through closer co-operation between states; for, until some better machinery for protection is provided, the right of the state to protect its legal interests can not, and should not, be taken from it.

Such action should represent the agreement of the entire family of nations, speaking through a law common to the world, rather than to one continent; and should be enforced through institutions established by the joint action of all states in the world, rather than by the selfish action of one or more of them, each in its own discretion. It is not a question of whether a state must submit to greater and greater responsibility under international law—that is inevitable. The only remaining question is as to the most efficient machinery for interpreting, administering, and enforcing that responsibility.

APPENDICES, BIBLIOGRAPHIES, AND INDEX

APPENDIX I

QUESTIONNAIRE No. 4*

RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORIES TO THE PERSON OR PROPERTY OF FOREIGNERS

The Committee is acting under the following terms of reference¹:

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following subject:

"Whether and, if so, in what cases a State may be held responsible for damage done in its territory to the person or property of foreigners."

On this subject the Committee has the honour to communicate to the Governments a report presented to it by a Sub-Committee², consisting of M. GUERRERO, Rapporteur, and Mr. WANG CHUNG-HUI³.

The nature of the general question and of the particular questions involved in it appears from this report. The report contains a statement of one theory as to the principles governing State responsibility in the matters considered and of the particular solutions derived from these principles. The Committee considers that this statement indicates the questions to be resolved for the purpose of regulating the matter by international agreement. All these questions are subordinate to the larger question, namely:

* League of Nations. Committee of Experts for the Progressive Codification of International Law, Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation. Adopted by the Committee at its Third Session, held in March-April, 1927. Geneva, 1927. C. 196. M. 70. 1927. V. [C.P.D.I. 95 (2)].

¹ See the Assembly Resolution adopted September 22nd, 1924.

² M. de Visscher was also appointed on this Sub-Committee but he was unfortunately prevented from taking any part in the preparation of the report.

³ Mr. Wang Chung-Hui signed the original text of the Sub-Committee's report. Having unfortunately not been able to attend the session of the Committee of Experts, he is not responsible for the actual text as annexed to the present document, this text containing certain amendments made by the Rapporteur in consequence of the discussion in the Committee.

"Whether and in what cases a State is responsible for damage suffered by foreigners within the territories under its jurisdiction and to what extent the conclusions of the Sub-Committee should be accepted and embodied in a convention between States."

It is understood that, in submitting the present subject to the Governments, the Committee does not pronounce either for or against the general principles of responsibility set out in the report or the solutions for particular problems which are suggested on the basis of these principles. At the present stage of its work it is not for the Committee to put forward conclusions of this nature. Its sole, or at least its principal, task at present is to direct attention to certain subjects of international law the regulation of which by international agreement may be considered to be desirable and realisable.

In doing this, the Committee should doubtless not confine itself to generalities but ought to put forward the proposed questions with sufficient detail to facilitate a decision as to the desirability and possibility of their solution. The necessary details are to be found in the conclusions of M. Guerrero's report⁴.

In the same spirit, the Committee begs to refer to M. Guerrero's report for the details when it submits to the Governments the following question, which is closely related to the main question brought to their attention above.

"Whether and, if so, in what terms it would be possible to frame an international convention whereby facts which might involve the responsibility of States could be established, and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement have been exhausted."

In order to be able to continue its work without delay, the Committee will be grateful to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

Geneva, January 29th, 1926.

(Signed)

Hj. L. HAMMARSKJÖLD,

Chairman of the Committee of Experts.

VAN HAMEL,

Director of the Legal Section of the Secretariat.

⁴ See *infra*, Section VI of the Report, Conclusions.

Annex to Questionnaire No. 4

REPORT OF THE SUB-COMMITTEE

M. GUERRERO, Rapporteur.

MR. WANG CHUNG-HUI.⁵

1. *Whether and, if so, in what cases a State may be held responsible for damage done in its territory to the person or property of foreigners.*

2. *Whether and, if so, in what terms it would be possible to frame an international convention whereby facts which might involve the responsibility of States could be established and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement have been exhausted.*

[Translation.]

Before considering the question of the international responsibility of States for damage done to foreigners, we think it will be advisable to examine not only the genesis of international law but the history of its growth, which is totally unlike that of national law.

Our inclination to do so is strengthened by the fact that the question itself—in the form in which it is stated—might be regarded as a contradiction in terms, because it refers in the same breath to international responsibility, which can only arise out of a violation of an international duty, and damage caused to individuals, which is exclusively a question of domestic law.

In making this preliminary survey, we shall rely on the data provided by legal researches which have been successfully conducted within the last few years, principally by the German and Italian schools.

I

For many years the juridical nature of international relations was denied by a number of authorities, but now the contrary view is almost universally accepted and is assuming definite shape as a legal doctrine.

The modern conception, however, is by no means founded on an idea substituted for that of *jus naturale*. It is the outcome of a logical sequence of scientific investigations; the result of a careful study of the various stages of the evolution of international law.

The absolute need of social intercourse created a need for law, that is to say, a set of standards to which the whole community had to conform. Indeed, it is impossible to conceive of any community, however small, without means of compelling its members to conform to its rules. These rules are determined by the nature of the relations between individuals, and by an equitable adjustment of the services they render. The compelling force which binds together the various individual interests of a community becomes a rule of law as soon as it engenders rights and duties.

⁵ See note 2 on page 233.

In relations between States, rules are the result of the will to create a social order governed by laws applicable to all.

So long as every State led an isolated existence, there could be no co-ordination of mutual relations. It was not until States realised that they had interests in common that they organised themselves into an international community. In so doing, however, they did not sacrifice their individuality. They merely combined their several wills in one common will and thus created law. This law is superior to all others, because it is the sum total of the wills of all nations, and the will of each nation is itself superior to the will of the individual.

International law, thus established with all its juridical standards, dominates the will of individual States and governs the relations of the whole family of peoples in a manner so undoubtedly binding that no State can disregard it. The authority of each State is subordinate to the higher authority of the international community. The binding character of international law is founded on the free consent of States thereto—the consent of all States and not merely the consent of some. In other words, the unilateral will of one State or the collective will of a number of States is not sufficient to create legal rules binding on the whole community of States.

Therein lies the fundamental difference between national law and international law. The will of the individual State is all-powerful in the creation of the former, but it cannot create the latter. Only as a manifestation of the collective will of all States can international law assume a tangible, positive and objective form.

In endeavouring, therefore, to ascertain the existence of an international responsibility—a point which we shall discuss later—we must not look to find the duties from which it derives outside the boundaries of that international law which has been formed by the wills of separate States coalescing in one single will.

The common will to establish some given rule as a legal international norm is expressed by formal or tacit agreement between the nations. Such agreement may or may not be in writing; but in either case, if it is carried out in practice, it is none the less the expression of a will which is destined to govern the mutual relations of the States. Whether it be termed a treaty or an international usage, whether it be founded on a *Vereinbarung* between States—as the German school would call it—or on international custom, the agreement is equally positive and binding. It is a manifestation of a common will and it embodies all the elements which characterise international legal rules. The force and authority of this will is equally valid, however it may be expressed: so much so, indeed, that the translation of a rule of customary law into written law neither modifies its nature nor increases its value; for instance, the violation of the immunity of diplomatic agents is not rendered one whit more or less serious by the fact that such immunity has or has not been formally recognised in a treaty.

It is none the less obvious that all treaties and usages must be regarded as sources of positive law, but no treaty or custom between two States can be held to be a source of law if it is in opposition to the will of the other States which form part of the community of peoples.

In our report, therefore, we shall constantly make use of this criterion of a collective will as evidence of the existence or non-existence of international responsibility. We shall thus avoid the old pitfall which has so often proved fatal to others who, after wandering far from the domain of international law, have sought to regain their foothold by grasping at ideas and notions which belong to quite a different sphere.

As we have shown, the body of law established by the will of international society is the only law which can govern the mutual relations of States, in other words, the rights and duties which States have accorded to or imposed upon themselves in their relations *inter se*. The violation of any of these rights involves the international responsibility of the offending State. Consequently, the injured State is alone entitled to complain. Under this system, States alone possess international rights and duties.

Individuals do not come within its scope. They move on a lower plane, where their lives are regulated in accordance with standards set up by a single will—the will of the State. In their own sphere individuals possess rights and duties and can accordingly incur responsibility, or, correlatively, invoke the responsibility of the State to which they belong. This body of rules, which governs the rights, duties and responsibilities of a State and of the individuals under its jurisdiction, constitutes domestic law, which is different in every respect and circumstance from international law.

According to the above definitions, therefore, the individual is not a subject of international law, and the violation of a rule of international law does not involve the individual in any responsibility.

Similarly, as international law imposes duties on States, only the individual is incapable of committing an offence against that law.

Any other interpretation would be tantamount to reverting to universal relations under the *jus naturale*, which is contrary to the system of positive international law.

Consequently in the present state of international law, as it ought to be defined, we can no longer admit the expressions which are still commonly used—of “international rights and duties of individuals” or “offences committed by individuals against the law of nations”—which are to be found in several treaties and legislations. The State is no more capable of violating the international rights of a foreigner—for the foreigner possesses no international rights—than the individual is capable of disregarding international obligations.

The error in question is due to an inexcusable confusion between national law and international law; between the law which governs the relations of the individual to the State and that which governs the rela-

tions of the State to other States. It would amount to regarding individuals as subjects whereas they are only objects.

This erroneous interpretation is often met with in international practice when claims are made for damage done to foreigners. The State which makes the claim, instead of doing so on its own behalf, comes forward as mandatory of the person who has suffered the damage.

The true rule should be that the individual may invoke the responsibility, under domestic law, of the State in which he resides; but that international responsibility may only be invoked by States.

II

After thus briefly examining the foundations of international law and one of the differences between domestic responsibility and international responsibility, it will be easier for us to deal with the first part of the question raised in I.

First Question

WHETHER A STATE MAY BE HELD RESPONSIBLE FOR DAMAGE DONE IN ITS TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS

The responsibility which we have to determine is international responsibility, *i.e.*, responsibility resulting from the violation of international law. We have seen that international law is the outcome of a collective will. We shall next seek to ascertain the circumstances in which such a collective will has been formed as regards the reciprocal rights and duties of States in the matter of the protection of nationals abroad.

This will, which is the creative force of international law, was first manifested when the international community came into being. States then realised that they had common interests which could only be harmonised by the rational organisation of inter-State relations. The community once formed, new States are admitted to it by an act of high importance, and the community, which has already observed the prenatal growth of the new State, examines its legal capacity, and is only ready to grant recognition if the new State can in return offer satisfactory guarantees. For its part, the new member, by the very fact of its recognition, is committed to the observation of its international duties.

To discover these duties, and their correlative rights, we must go back to one of the two sources of international law: treaties, or customary law. Doctrine only merits relative consideration as a means—sometimes a satisfactory means—of throwing further light on juridical rules and rendering their formation easier. Doctrine as a creative source of law has even less force than the unilateral will of States. It has no power to determine what is the unanimous will of nations. It may, however, become law by its incorporation in international practice; but in that case the source of such law is custom and not doctrine.

As regards the protection of foreigners, customary law lays down cer-

tain rules which clearly express the definite will of States regarding the rights which they agree to accord to foreigners, the manner in which foreigners are to be treated, the method of determining the State which is responsible for their protection, and the means of ensuring such protection.

It will be of interest to examine these rules because we shall have to revert to them every time we seek to establish the constitutive elements of an international responsibility. We shall summarise the rules, briefly, in order to remain within the limits of our task.

1. *Rights*.—Some rights are not rights created by States for the benefit of their nationals or of foreigners; namely, the right to life, the right to liberty and the right to own property. The community has simply recognised the existence of these rights and States have mutually undertaken to ensure the possibility of enjoying them.

This undertaking is so nearly universal that many authors have been unable to resist the temptation to regard these rights as international rights of the individual. But in so doing they have committed the fundamental error of attributing to the individual a character which he does not possess—they have made him a subject of international rights and duties.

In speaking of rights, therefore, we mean that these individual rights ought to be recognised by all nations. In fact, wherever a man goes he takes his rights with him, and wherever he is it is the will of all States that these rights should be safeguarded. Before these rights, nationality sinks into the background, because they belong to the man as a human being, and are not, accordingly, subordinate to the will of the State.

This, however, is not equivalent to stating that the undertaking to safeguard these rights constitutes an absolute guarantee against any action to the prejudice of such rights, or that the State is responsible for any infringement of such rights. Their recognition simply implies the duty of surrounding the individual, whether he be a national or a foreigner, with adequate means for defending them.

2. *Treatment*.—Here also the will of the community of peoples is clearly defined. It accepts the above-mentioned rights as being the minimum which a State should accord to foreigners in its territory, but it does not thereby recognise the right to claim for the foreigner more favourable treatment than is accorded to nationals. The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that a State is obliged to accord such treatment to foreigners unless that obligation has been embodied in a treaty. We thereby infer that a State goes beyond the dictates of its duty when it offers foreigners a treatment similar to that accorded to its nationals. In any case, a State owes nothing more than that to foreigners, and any pretension to the contrary would be inadmissible and unjust both morally and juridically.

3. *The Protector State*.—Nothing can be more logical than the de-

sire of States to have it laid down that protection must be afforded exclusively by the State in the territory of which the foreigner happens to be.

This is easy to explain. Protection involves certain positive acts that can only be performed by the State possessing the sovereignty. Any duality of sovereignty would be inconceivable, for one sovereignty would exclude the other. The will of the States, in this matter, may be adequately expressed as follows: No trespassing on the sovereignty of another, and no renunciation, in however small a degree, of this essential prerogative.

Dual protection would, moreover, constitute a twofold and unjust inequality—first, from the point of view of the nationals of the State in which the foreigner resides, who are only protected by their own State; and secondly, from the point of view of the foreigner's conationals, who remain in the home country. A person leaving his country, and thus depriving it of his personal effort, would possess the privilege of being protected both by the State of origin and the State of adoption.

4. *Methods of affording Protection.*—As to methods, the will of the international community has not been expressed in positive terms. Its duty is to protect foreigners, but not to determine the methods to be employed.

In other words, every State is free to select its own ways and means of affording protection. The reason for this is obvious. The affording of protection is an element of national law, a field in which the will of the State is the supreme arbiter. It admits of no intermediary.

Nevertheless, the general means employed are almost everywhere the same: the laws and organs of the State. There is no other way of ensuring the observance of a duty involving a series of acts which are themselves subject to decrees of the State.

The State, however, remains free to organise its internal existence as it thinks best. What is required of the State is the fulfilment of the international duty: how it does so matters little.

But, although the State is perfectly free to select what methods it prefers for the protection of foreigners within its territory, it is not free to restrict its responsibility to cases of violation of the arrangements which it has made. Responsibility may be incurred by failure to adopt methods which should have been adopted or by the inadequacy of the methods actually adopted.

The above considerations will help us to formulate an answer to the first question asked. States are bound to conform to definite rules of conduct in respect to foreign nationals within their territory. If these rules are violated, and if, in certain circumstances, damage is thereby caused to such foreigners, the State in question may be held responsible to the State of which the foreigners are nationals.

We say in "certain circumstances," because damage does not *per se* imply

international responsibility. For international responsibility to exist, the damage must be the result of a violation, by the State itself, of some international rule. Such violation may be positive or negative. It is positive when the State commits an unlawful act, contrary to international law; if, for instance, by a national law, it declares property owned by foreigners in its territory to be State property, without granting any compensation. It is negative when the State omits to fulfil a positive duty; for instance, when it fails to provide a judicial organ before which foreigners may defend their rights.

In both cases, the State has failed to fulfil an obligation which it voluntarily and freely assumed as a member of the international community—the obligation to accord to the individual certain rights, including the means of defending these rights. The State of which that individual is a national is wronged, in the first case by an act contrary to international law, and in the second case by an omission to fulfil an international duty. The responsibility is, therefore, international, because the act, or the omission, is to be laid at the door of the State itself.

Nevertheless, in order to establish international responsibility beyond doubt, care should be taken to ascertain that an international right does exist, and that it is not merely a case of some damage—no matter what—having been suffered by a foreigner.

The same act may, according to circumstances, be contrary to international law, or quite unconnected with international law. For instance, if a State were bound by treaty to grant to the nationals of another State treatment as favourable as that which its domestic legislation accorded to its own nationals, any infringement of this rule would involve the international responsibility of the former State. An illegal act would be imputable to that State. But, if no such treaty obligations had been incurred, no responsibility could be invoked, because the other source of international law—customary law—does not impose this obligation.

When we speak of an illegal act committed by the State, we mean an act done by the organs through which the State performs its functions and which enable it to fulfil its international duties.

Every one of these organs, whether it be legislative, administrative or judicial, can commit an illegal act, contrary to the rights of another State, imputable to the State to which the organs belong, and consequently involving that State's responsibility.

Should any act or omission, in the circumstances mentioned above, cause damage to foreigners, international responsibility would arise, not by reason of the damage suffered, but because of an infraction of international obligations which the State was bound to fulfil. In the case now under consideration the obligation arises from the fact that States are bound to afford protection to foreigners under their jurisdiction.

We say "under their jurisdiction," and by this we mean that protection must be afforded in all territories over which the State exercises its sovereignty, though it cannot be afforded outside these limits. Conse-

quently, a State is bound to fulfil this obligation in its colonies and protectorates, but is not bound to do so in any part of its colonies or territories which may, temporarily or finally, have ceased to be subject to its sovereignty.

In the latter case, the duty of protection would devolve on the State occupying such territory.

In composite States, the infraction of an international rule by one of the component States of the federation involves the responsibility of the central power, which represents the State in its international relations. The central power may not advance the argument that the component State is autonomous; it cannot, any more than a centralised State, plead the independence and autonomy of authorities of a member State in order to avoid responsibility for, say, some legislative act. An argument of this kind, which might be admissible in domestic law, is inadmissible in international law, because, as regards relations between States, the community of nations only recognises the authorities which represent a State in external affairs.

As regards composite States, the question has been satisfactorily settled in Article 4 of the Regulations adopted by the Institute of International Law at its session of September 10th, 1900, where it is laid down that "the government of a federal State composed of a certain number of small States, which it represents from an international point of view, may not plead, in order to avoid the responsibility resting upon it, the fact that the constitution of the federal State does not give it the right to control the member States, nor the right to exact from them the discharge of their obligations."

III

Second Part of the First Question

IN WHAT CASES A STATE MAY BE HELD RESPONSIBLE FOR DAMAGE DONE IN ITS TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS

The foregoing considerations will be of great help to us in determining the limits of international responsibility in individual cases, without having recourse to obsolete ideas or conceptions based on analogies derived from domestic law.

It is particularly important, in the codification of international law, to steer resolutely clear of all conceptions which would tend to augment the responsibility of States by incorporating in international law principles drawn from dissimilar and even contrary sources.

Such tendencies have prejudiced the cause of international law and have increased rather than reduced the number of international disputes. We must be careful to avoid all exaggeration, as this might constitute a lasting and serious menace to friendly international relations. We must always consider the inter-State will, the only force that can create inter-

national law, and must refuse to admit responsibility whenever international opinion is divided or doubtful.

This will certainly be a prudent attitude to adopt, all the more so because States, as at present organised, possess in themselves the necessary means for rendering the protection of foreigners effective.

It is in the light of these observations that we shall now proceed to consider the various circumstances which may cause damage to foreigners and which may or may not involve international responsibility.

*Political Crimes committed against Foreigners in the Territory
of a State*

Political crime is the most serious case which can arise, since international law requires a higher form of protection for the foreigner who represents his State officially.

This crime, however, would not in itself constitute a violation of international law. Men, whether they are public officials or not, will always be exposed to the risk of injury and damage. It was obviously not the intention of the international community that the representative character of an individual should render him immune from ordinary misadventure.

Nevertheless, States have undertaken to exercise greater vigilance over these persons than they do over private individuals. They are also bound to take special steps to forestall any assault against the persons of foreign representatives and to display particular energy in pursuing the criminals and ensuring the proper course of justice.

Only if a State neglects these duties, or fails to act with all due diligence and sincerity, will its conduct involve an international responsibility.

This question has already been examined and skilfully settled by a special Committee of Jurists appointed by the Council of the League of Nations on September 28th, 1924.

The question was defined as follows:

"In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime in its territory?"

The reply of the Committee of Jurists was:

"The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

"The recognised public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf."

This method of defining the international duty of a State and determining the limits of its responsibility is entirely in keeping with the

criterion which we suggested in Part I of this report. It has never been the intention of States themselves to guarantee the inviolability of individual rights or to assume responsibilities which belong to others. They have simply undertaken to make such domestic arrangements as will ensure that foreigners shall find in their territory the relative security afforded by good internal organisation and the existence of appropriate organs for the repression and judgment of crime.

This limitation of the obligation, and of the consequent responsibility, should impel the State which has suffered as a result of the crime to adopt an extremely prudent attitude towards the State in which the crime was committed or attempted. Responsibility cannot be established until a full enquiry has been conducted into the facts of the case. Therefore, as regards political crimes committed against strangers, we propose the adoption of the text which was given above.

Illegal Acts of Officials

We have said that officials, to whatever branch of the national administration they may belong, are organs of the State and their acts are consequently to be regarded as acts of the State.

It is indeed through its officials that the State exercises protection. The obligation to provide officials has not been contracted in so definite a form as we have stated it, since international law has created the duty without laying down rules for its application. But, since the State is an abstract entity, it must, in order to find expression, provide itself with organs wherewith to exercise its powers.

Again, though it is perfectly true that the State is not bound to possess any specified organ, it is none the less under an obligation to set up all the organs which it requires to fulfil its international duties.

The first question which now arises is whether all acts of officials should be regarded as acts of the State. Our answer is in the negative, and we draw a distinction between acts accomplished by officials within the limits of their competence and acts which go beyond these limits.

The former are truly acts of the State and, if they are contrary to international law and adversely affect the rights of another State, they must certainly involve the responsibility of the State to which they can definitely and indisputably be ascribed. If, in these circumstances, a foreigner suffers damage, it is for the State to make compensation for such damage.

The reason for this is clear. When the official acts within the limits of his competence, he is obeying a command of the State. If such command infringes a rule of international law, the State must be responsible, since the infringement must arise from the command being wrongful, either as going beyond the rights of the State or as failing to satisfy a duty owed by the State.

In either case, the act of the official, though lawful from the point of view of domestic law, is an illegal act on the part of the State.

In order, however, for the responsibility of a State to be really involved because a foreigner had suffered damage through the fault of an official, and for the State of which the foreigner is a national to be entitled to consider itself wronged and to claim reparation, certain conditions must be fulfilled. These conditions are as follows: (1) the act accomplished by the official within the scope of his official powers must be contrary to an international duty; (2) the duty violated must be a legal and not merely a moral duty; (3) the right invoked by the injured State the violation of which has involved the damage must be a positive right created by treaty between the two States or by customary law duly recognised as emanating from the collective will of States; and (4) the damage must not be the result of an act accomplished by the official in defending the rights of the State.

When these basic conditions have been fulfilled, the international responsibility becomes clearly established and the State cannot plead the inadequacy of its laws. It has, indeed, incurred responsibility precisely because it has not foreseen the need of adequate legislation to enable it to fulfil its international duties. That is the main reason for the publication of treaties. By their publication treaties become laws which officials are bound to know and observe.

If the act of the official is accomplished outside the scope of his competence, that is to say, if he has exceeded his powers, we are then confronted with an act which, juridically speaking, is not an act of the State. It may be illegal, but, from the point of view of international law, the offence cannot be imputed to the State.

Those who seek to render States responsible for such acts are obliged to fall back on theories which are often ingenious but which have no place in international law. We may quote, for instance, the theory of *culpa in eligendo* or *in custodiendo*. This theory, like all the other faulty theories, is based on a *presumptio juris et de jure*, which cannot be applied in international law.

Moreover, is any State so perfectly organised that it can be certain of never making an error in choosing its officials or supervising their acts? Can it even be stated that a man will always conscientiously fulfil his duties and be incapable of ever committing a wrongful act?

Some persons assert that the existence of this responsibility is supported by the numerous precedents to be found in the past history of international claims. It would be extremely dangerous to attribute any value to these precedents. Positive international law cannot derive its strength from sources which are so exiguous and so conflicting.

A practice which is based on the use of force cannot be described as international practice in the sense admitted by international law. On the contrary, for the sake of the law's prestige, we should be careful to include in customary law only that which undeniably represents the definite will of all States composing the international community.

It would be inconceivable that States should, in their anxiety to pro-

tect foreigners, go so far as to guarantee these foreigners against all abuse of power on the part of the authorities and substitute international responsibility for individual responsibility.

Just as the act of the official, accomplished within the limit of his competence, is, from the point of view of international law, an act of the State, because it constitutes an application of the national law—no matter whether such law be perfect or faulty—so an irregularity on the part of an official is an individual act, which is not willed by the State and may even be the result of malice on the part of the official.

Although such cases should not be regarded as coming within the scope of international law, the State is nevertheless bound to proceed in such a way as to obviate their occurrence as far as possible, and to enable the foreigner who has been wronged to take action against the offender.

We shall therefore place these cases in a higher category than unlawful acts committed by individuals who are not officials. Acts of private persons and acts of officials who exceed their powers are alike private acts, but we consider that the vigilance exercised by the State should be more strict in the latter case.

Thus, with regard to acts of officials, international responsibility arises if a Government, being informed that an official is about to commit an unlawful act against a national of a foreign State, does not take timely steps to prevent it; or if, when the act has been committed, the Government does not hasten to visit the official in question with condign punishment under the national legislation; or, again, if it fails to give effect to the proceedings which the injured foreigner is entitled to bring in conformity with the State's legislation.

Apart from these circumstances, a State cannot be held responsible under international law.

Acts of Private Persons

It is in this connection, more especially, that a mass of theory has been evolved with a view to proving that a State is internationally responsible for the acts of individuals subject to its jurisdiction. None of these theories will bear careful scrutiny.

In the first place, an attempt has been made to resuscitate a mediæval conception under which the body politic was held to be responsible for the acts of its members. This conception, which may have been of some service when all power was concentrated in the hands of sovereigns, would be utterly inapt in the present position of the relations between the State and the individuals under its jurisdiction.

Grotius took a step in the right direction by opposing to this theory the Roman conception of *culpa*, but his view was still far from meeting the requirements of international law and defining the true function of modern States in their international relations.

At the present time, the postulate that the State is not responsible for the acts of others has become a basic legal rule: indeed, if it were not so, the very foundations of the community would be shaken.

The sovereigns, who were formerly identified with the State, are no longer absolute masters of everything within their territory. The individual as well as the sovereign has a sphere of action proper to himself. He has full liberty of action and is responsible for his acts. The relation of one State to other States is the same as that of the individual to the State in which he resides. If one private person, be he national or foreigner, causes injury or wrong to another private person, be he national or foreigner, his act, being unlawful from the point of view of domestic law, entitles the injured party to take legal action in conformity with the law of the country.

We do not think it necessary to dwell at any length on this subject, as its importance, from the point of view of international law, is slight. Should any doubt arise concerning wrongs due to the acts of private persons, it will be sufficient to refer to our definition of the violation of international law and the nature and limits of the responsibility of States in their mutual relations.

Acts performed in the Exercise of Judicial Functions

If there is one general principle concerning which there can be no discussion, it is respect for the majesty of the law. As between self-respecting States, there can be no greater insult than to question the good faith of municipal magistrates in their administration of justice.

There are certain other principles as unquestioned and as widely observed as the above. For instance, the principle that all interference or claim to interfere with the regular course of justice in another State is tantamount to an attack on that State's internal sovereignty.

Here we have certain legal standards, as categorical as they are precise, created by the will of all countries as rules of conduct to be observed in all circumstances of the life of the international community.

As regards the duty of affording judicial protection to foreigners, it is sufficient that they should be granted a legal status, which they can assert through appropriate laws and independent tribunals to which they are allowed access on the same footing as nationals. Neither more nor less.

The decisions of these tribunals must always be regarded as being in conformity with the law. None but a judge of the country is entitled to interpret that country's law. Even if he makes a mistake his judgment must be accepted; the dignity of justice and the character of modern States demand this.

The opinion that a State is not responsible for a judicial error committed by its tribunals is so firmly implanted in the minds of nations that legal publicists in all countries have criticised—and often very harshly criticised—the arbitral award under which De Martens declared the Netherlands to be responsible for the judicial error committed by its courts in the case of the Australian vessel *Costa Rica Packet*.

This is equivalent to saying that the community of nations admits no

appeal against judicial errors other than that which the *lex loci* itself may afford to foreigners as well as nationals, and that, if no provision is made for appeal, both parties must acquiesce and cannot claim to invoke any responsibility at all on the part of the State in which the case was heard.

The same principle must apply to sentences which have been termed "*unjust*" or "*manifestly unjust*."

Nothing could be more dangerous than to admit the possibility of rehearing, elsewhere than in the courts of the country, a judicial decision alleged to be contrary to justice. An opening would thus be afforded for abuses of every kind, for the most serious violations of internal sovereignty and for countless international conflicts.

As States are at present organised, each being bound to respect the institutions of the others, any endeavour to create, at a given moment, a special court having power to overrule the national judicature would be unthinkable.

Unless we are ready to upset the one true basis of international law—the collective will of States—we will not entertain the supposition that States, when they entered the community, ever contemplated an abridgment of the dignity and authority of their own courts of law. That, however, would be the final result of rehearing a case where no provision for appeal existed under the legislation of the State concerned; and yet the advocates of the theory of international responsibility, in connection with judicial decisions vitiated by *manifest or flagrant injustice*, would inevitably be led to provide for some such re-hearing.

Where would they find a *super-judge* competent to determine the existence of such injustice? And, supposing that they could discover such a personality, what would become of the principle of the equality of States, a principle on which the international community is based, and which cannot be disregarded without shaking the whole edifice to its foundations?

Moreover, to admit the possibility of international proceedings being brought in another country, in opposition to the original *lex loci*, would be contrary to the international rule under which nationals of a foreign State cannot claim more favourable treatment than nationals. This would, however, be the result if foreigners had an international appeal open to them in addition to the remedies offered by the national law.

We should not continue this reasoning any further had not a number of modern legal publicists unfortunately come forward in favour of this view of international responsibility. We must therefore persist in our argument, and we shall substantiate our contention—that no international recourse is admissible against municipal judgments—by quoting certain cases. These cases demonstrate the repugnance with which requests for intervention on these lines have almost invariably been received.

In 1885, when the Government of the United States of America received a request of this kind, the secretary of State, Mr. Bayard, sent

a letter to the American Minister in Mexico in which he said: "This Department is not a tribunal for the rehearing of decisions of foreign courts, and we have always laid down that errors of law and even of fact, committed by these tribunals, do not afford a motive for any intervention on our part."

Another American Secretary of State, Mr. Marcy, adopted a similar line in writing to the United States Minister in Chile, Mr. Starkéatter: "Irregularities committed in the case of an American citizen in Chile, unless they amount to a *refusal of justice*, afford no grounds for intervention by the United States."

When Great Britain and Portugal submitted to arbitration the question of the alleged *manifest injustice* of a decision given by the Corte de Relação, the arbitration tribunal stated: "While we unhesitatingly admit that the decision was erroneous, we cannot agree that it was manifestly unjust. It would be manifestly unjust to hold the Portuguese Government to account for faults imputable to the courts of that country. According to the Portuguese constitution, these courts are absolutely independent of the Government and therefore the Government can exert no influence over their decisions. The British Government cannot disregard this fact without at the same time disregarding the whole existence of Portugal as a civilised State, and that is obviously not the intention of the British Government."

As these views were expressed in cases in which the party concerned happened to be a small State, we can well imagine the reception which a great Power would accord to a claim to hold it responsible for an unjust decision given by its magistrates.

In every State the independence of the judicature and respect for the law are recognised as such fundamental principles that even when the courts are called upon to apply the rules of private international law, which, as a result of an international treaty, fall within the scope of the State's own laws, they are not made subject in doing so to the supervision of their Government (resolution of the Institute of International Law at its session at The Hague in 1875).

Another theory which is quite as inadmissible is that international responsibility is incurred through abnormal delay in the administration of justice.

No State can claim to possess courts so efficient that they never exceed the time-limit laid down in the laws of procedure. The larger the State, the greater the number of cases brought before its judges, and consequently the greater the difficulty of avoiding delays, sometimes quite-considerable delays.

If we agree that the State is responsible neither for judicial errors nor for the manifest injustice of judicial decisions, nor for abnormal delay in the administration of justice, are we to infer from this that the State has no responsibilities in regard to the manner in which it dispenses justice? Certainly not. Its international responsibility may become seriously involved.

We have already shown that the State owes protection to the nationals of foreign States within its territory and must accord such protection by granting foreigners the necessary means for defending their rights. But these means can only be such as are made available by the laws and courts of the country and by the authorities responsible for public order and security.

In the case in question the State would not be fulfilling its duty towards other States if it did not allow foreigners to have access to its courts on the same terms as its own nationals, or if these courts refused to proceed with an action brought by a foreigner in defence of the rights which are granted to him and through the means of recourse which are provided under the domestic laws.

Such responsibility would arise as the result of a *denial of justice*.

In saying "on the same terms as its own nationals," we desired to emphasize the necessity of equality as regards access to the means of recourse open to all persons under the same jurisdiction. Thus, if the nationals of a State are allowed to appeal from the decision of a court of first instance, the same privilege must be accorded to foreigners when their recognised rights are in dispute.

The decision of a judicial authority, in accordance with the *lex loci*, that a petition submitted by a foreigner cannot be entertained should not, however, be regarded as a *denial of justice*. The State has fulfilled its duty by the very fact that the local tribunal has been able to give a decision regarding this request.

Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although, in the circumstances, nationals of the State would be entitled to such access.

In conclusion, therefore, we infer that a State, in so far as it is bound to afford judicial protection, incurs international responsibility only if it has been guilty of a *denial of justice*, as defined above.

Damage caused to Foreigners in Cases of Riot and Civil War

This problem has long been a source of disputes of every kind, and discussions which have not yet led to the enunciation of any definite rule. This is not due to the absence of international juridical standards by which the problem might be solved, but rather to a habit, which certain exponents of international law have acquired, of straying into fields where no enquiry on the lines of international law can be usefully carried out, and then evolving a series of quite unwarrantable conclusions, by means of analogies which are incompatible with that law.

Some authorities, in their desire to attain these results, have not hesitated to delve into the remote past, and to explore both the individualist and collective conceptions of law.

When these theories have crumbled away in the light of careful research, other theories have been advanced to replace them—new indeed, but equally futile.

The latest of these were expounded during the discussion of the regulations drawn up at Neuchâtel by the Institute of International Law, namely, the theories of *expropriation* and *State risk* (*risque étatif*).

We will examine these theories briefly, but will not of course approach the question from the same standpoint as their authors. Our sole concern is to discover rules of international law capable of being codified; we cannot therefore allow ourselves to wander deliberately further and further away from international law in the search for some basis of international responsibility.

Brusa has done so, and has openly avowed it. In his report to the Institute of International Law he states that foreign diplomatic intervention should be limited to cases in which justice is not accorded to a foreigner who has suffered damage in time of riot or revolution, or in which the Government has violated the law of nations, in particular (he observes) by violating a treaty under which foreign residents are exempted from forced loans and contributions.

"In this case," adds Brusa, "in addition to the correlative duty of affording compensation for the services rendered and returning the property received, the State has, it would seem, at the same time actually incurred responsibility towards the foreign State under the law of nations, and has thus afforded ground for direct diplomatic intervention."

Unless we are mistaken, the logical outcome of Brusa's idea is that:

1. The obligation to compensate for damage arises from the fact that the State has received services,
2. The responsibility of the State only becomes of an international character when the State violates the law of nations by the *denial of justice* or the violation of a treaty.

This would prove that the "responsibility" arising out of Brusa's arguments is purely civil.

In correlation with his theory of compensation for benefits received by the State (and as if he purposely desired to break away from international law), he advances simultaneously his other theory of *expropriation* in civil matters.

What would become of international law if rules deriving from private law were thus transferred to its sphere on the sole ground of some sort of analogy? And is there really any such analogy between the relations of States *inter se* and the relations between a State and individuals; between the international community and the national community? In the first place, there can be no juridical analogy between two bodies of law which are different as to their source, their content and their validity. International law and private law have been created, and are moved, by two separate forces, which have absolutely no kinship with one another. For the first, although it is superior, the concurrence of many wills is required; the latter is subject to no such limitative necessity.

According to this principle, therefore, international law must keep itself pure from any infiltration of domestic law.

Neither in the theories of Brusa, nor in the application of the idea of *risk (risque)* proposed by Fauchille on the same occasion, do we perceive any principles of private law which could be converted into principles of international law. It is therefore juridically impossible to draw any conclusions therefrom, even of a provisional nature.

In short, it is idle to assert that the elements required to establish international responsibility can be found in civil law or in the ideas applicable to civil law.

Apart from the fundamental difficulty which we have pointed out, these two theories are open to other criticisms. The theory of *expropriation*, for instance, ceases to be accurate when it places all loss that a foreigner may suffer in the case of revolution on the same footing as the loss of property for reasons of public utility. In the latter case we have a rendering of services which constitutes an undoubted title to compensation, however the question may have arisen; whereas, in other acts which may involve loss, we do not perceive a similar rendering of material services.

The theory of *State risk (risque étatif)* tends to introduce into international law economic conceptions which are out of place in international relations. The arguments by which it has been sought to bring these conceptions into the sphere of international law neither enhance their value nor justify their admission. "Foreigners," said Fauchille, "who come to take up their residence in a country constitute, like nationals, a source of gain for the State in which they reside: their industry and their sojourn in the territory bring profit to the State. Is it not logical and just that, in return, the State should be bound to give compensation for loss which these persons—be they nationals or foreigners—may have suffered at the hands of other nationals or other foreigners?"

Would it not be more logical to reverse the argument and say: Foreigners do not leave their homeland in order to be of profit to the State in which they take up their residence. On the contrary, they come to the country with the definite intention of availing themselves of its wealth, its hospitality and its institutions, hoping to carve out for themselves a better position than that which they have left behind them. Their change of residence being voluntary, they must accept all the risks of chance happenings and unforeseen events.

In this survey we should also reject all theories which base the responsibility of the State, in case of riot or revolution, on a *presumptio juris et de jure* or an *obligatio ex delicto*.

International law itself provides the basis for the solution of this question.

A *riot* is an act committed by private individuals, and not by the State. No loss occasioned to foreigners by a riot involves international responsibility unless the State has neglected to fulfil its duties of exercising vigilance, repressing disorder and providing judicial protection.

Damage caused by revolution may be the result of acts committed by either of the opposing parties. If the acts are committed by the lawful authorities, whose concern it is to restore order, the State is not responsible for the fact that, in exercising its supreme right and duty, it has caused damage to foreigners, since the interests of the community, of which foreigners as well as nationals form part, are higher than any private interests. The State, by taking steps to restore the well-being of the community, has simply acted as an entity which is bound, both from a national and an international standpoint, to maintain order and security. The former duty arises under the constitution, and the latter under the obligation which the State has contracted to ensure normal conditions of life for foreigners, and these conditions can only be secured if order and peace prevail. Although the claim of absolute irresponsibility may just conceivably be open to question when a State is exercising a right, it cannot possibly be questioned when the State is simultaneously exercising a right and discharging an international duty.

We do not share the opinion of those who deny that revolution is a case of *vis major*. In general, neither wars nor revolutions are desired by the State—the latter, indeed, even less so than the former. They almost invariably occur because some blind force, against which the public authorities are powerless, has been set in motion. No State is immune from the evil. Revolution bursts upon a country with all the brutal force of some convulsion of nature. Foreigners as well as nationals have to partake of the consequences and share in the good or evil fortune which these undesired and unforeseen events may bring.

If it could be sustained that the protective rôle of a State renders it indisputably liable to grant compensation for all losses suffered by foreigners, we could not overlook the question of compensation for losses caused to foreigners by strikes. In this case the responsibility of the State would be even more directly involved, since, in almost all countries, the State recognises the right to strike, or at any rate tolerates strikes. It should not be forgotten that in the intensive modern life of great cities a strike may cause greater loss to foreigners and nationals than that occasioned by minor revolutions, which have often formed a pretext for inordinate claims.

Loss occasioned by the acts of rebels or revolutionaries comes within the category of acts done by private individuals and therefore not imputable to the State. In this connection we should remember the rule that the duty of protection is confined to the territory over which the State exercises its sovereignty.

A State cannot be held responsible for occurrences in a territory no longer under its authority or control, when a case of *vis major* prevents it from fulfilling its duties as protector.

Let us now refer to customary law in order to ascertain whether there is any rule which may be regarded as an expression of inter-State will in the matter of losses suffered by foreigners in civil wars.

Customary law demonstrates with mathematical exactitude that States, wherever situated, have on all occasions absolutely rejected all international responsibility for such losses.

Powerful States have invariably asserted this rejection of responsibility in terms so clear and precise that no doubt can exist as to their very definite views on the subject. Weaker States, when they have not been able to resist external pressure, have indeed paid indemnities, but always subject to the reservation that they were not bound at law to pay them, and were simply doing so as an *act of grace*.

We will quote a few instances of States which, on various occasions, have pleaded the non-existence of international responsibility: Belgium, in 1830 and 1834; France, in 1830, 1848 and 1871; Russia, in 1850; Austria in 1865; the United States of America during the War of Secession and in 1851, when a number of Spaniards were victims of the populace of New Orleans; and also all the States of Latin America.

Treaties concluded between certain European States, and between several of the American States, which contain provisions disclaiming responsibility in case of damage occasioned by revolt and civil war, have often been the subject of criticism. We think that these criticisms ought rather to be levelled against the nations which, in defiance of all international rules, have sought to impose on other States a responsibility which the latter could never really have incurred. The States of Latin America have acted wisely in endeavouring to secure protection for their legitimate rights by means of treaty provisions.

It should be noted, moreover, that these treaties are careful not to exclude responsibility arising from a *denial of justice*.

In short, if international law is to be codified—as it certainly should be—in accordance with the will of States, as manifested either by treaties or by international practice, we must conclude that the State is not responsible for loss suffered by foreigners in cases of riot or revolution.

We do not, however, include in this category loss of property sustained by foreigners through the action of the State as a result of requisition, expropriation, confiscation, spoliation or on any other arbitrary proceedings. Whether in peace, in war or in time of revolution, the State should be foremost in respecting and protecting the property of foreigners.

We have said that property, with life and liberty, forms part of the fundamental rights of the individual and that these rights must be recognised and protected wherever the individual happens to be. A state of war or revolution would in no way justify the violation of any of these rights, and a State failing in the duty, which it has contracted with regard to the international community, to afford safety and protection would also incur international responsibility.

The State is therefore bound to grant compensation for the property of foreigners which it has appropriated in time of revolution.

As regards the property of foreigners seized by revolutionaries or rebels—an act which, as we have pointed out, falls within the category

of acts committed by private individuals—the State must provide such foreigners with all facilities for prosecuting the offenders and recovering possession of their property. If, on the contrary, the State were to deprive these foreigners of all means of action, by passing a law of amnesty, its international responsibility would be involved and it would be answerable for any damage which the revolutionaries or rebels might have caused to the foreigners in question.

V

Second Question

WHETHER AND, IF SO, IN WHAT TERMS IT WILL BE POSSIBLE TO FRAME AN INTERNATIONAL CONVENTION WHEREBY FACTS WHICH MIGHT INVOLVE THE RESPONSIBILITY OF STATES COULD BE ESTABLISHED, AND PROHIBITING IN SUCH CASES RECOURSE TO MEASURES OF COERCION UNTIL ALL POSSIBLE MEANS OF PACIFIC SETTLEMENT HAVE BEEN EXHAUSTED.

We have shown that international responsibility does not arise by reason of any loss which foreigners may sustain but by reason of a failure to act, or the commission of an act contrary to international law and imputable to the State. Although in some cases responsibility clearly results from the existence or non-existence of a fact, it is often—we might say almost always—necessary to conduct a careful enquiry into the facts in order to ascertain whether they really give rise to a question of international law and whether the State has incurred responsibility.

At present, the best international method for conducting such enquiries is that of international commissions of enquiry.

Let us summarise the advantages of these commissions:

1. The time which elapses between the committing of the acts and the constitution of the commissions undoubtedly helps to abate the excitement and passions aroused;

2. The nationality of the persons appointed to conduct the enquiry, their standing and the moral responsibility which rests upon them afford a guarantee of the impartiality of their investigations;

3. Since the conclusions of these commissions do not take the form of an arbitral award, the conflict may be eliminated by the mere acceptance of these conclusions, without any judgment, which might wound the susceptibilities of the responsible State, having been pronounced;

4. Should the conclusions produce no immediate result, the dispute may still be settled by other pacific methods.

In most cases the enquiry may be expected to end the dispute without creating any abiding bitterness between the two States concerned. Neither party has reason to regard itself as victor or vanquished; neither has had to bow to the peremptory dictates of a judicial sentence. The commission merely submits its report and the parties concerned are free to

draw their conclusions therefrom and to order their actions accordingly.

We should not forget the immense service which was rendered to the cause of peace by this method of conciliation in the Dogger Bank affair between Russia and Great Britain. Never has a question of damage caused to foreigners brought two great Powers so near to the brink of war as in 1904, when the Russian fleet on its way to the Far East bombarded a British fishing fleet on the Dogger Bank.

War was only avoided by having recourse to one of the international commissions of enquiry provided for in the Hague Convention of 1899.

The first result of this procedure was to allay the justifiable indignation which had been aroused in England and which was gathering volume as the discussion between the Russian and British Governments continued.

The commission was composed of five members, one being chosen by the Government of each of the nations concerned, two others by the French and American Governments, and the fifth by these four members sitting together. Four months later it submitted a report, stating, amongst other conclusions, that the British fishing fleet had not committed any hostile act and that as there was no torpedo-craft among the trawlers or in the vicinity, the Russian Admiral Rojestvensky had not been justified in opening fire.

In view of this very conclusive statement, the Russian Government, without further procedure or action, paid the British Government an indemnity for the victims and the incident was definitely closed.

Treaties, with a compulsory clause, concerning international commissions of enquiry, have already been concluded between several States, in particular between France and the United States, between the United States and a number of Latin-American States, between the Central American Republics and between Argentina, Brazil and Chile.

Consequently, we propose that an international convention should be drawn up under which the signatory States would bind themselves to entrust to international commissions of enquiry the investigation of the facts which may have given rise to an incident, involving international responsibility, where it has been impossible to settle such incident by ordinary methods.

Whenever a dispute should arise the parties concerned would be entitled to demand the appointment of a commission of enquiry.

The Permanent Court of International Justice might be chosen to act as an intermediary organ between the States parties to the dispute. On receiving a request, the Court would invite each of the States concerned to appoint a commissioner and would at the same time request two Governments, selected by itself, to appoint two other commissioners each. The Court would fix the date and place at which the four members should meet to elect the fifth commissioner—who would be Chairman of the Commission—and to begin the enquiry.

The procedure to be followed and the powers of the commission might also be defined in this Convention.

Further, and most important of all, there would be a clause by which the States would undertake not to commit any act of violence either before or after the formation of the commission of enquiry, and to provide the latter body with all necessary facilities for carrying out its task.

The commission should also have the power to order measures for safeguarding the rights of each of the parties concerned until the commission has submitted its report.

The report and all decisions and conclusions of the commission would have to be agreed to and drawn up by a majority vote.

The report should merely establish the facts, without taking the form of an award, leaving the parties free to act as they think best on the conclusions of the commission of enquiry. As a corollary to the undertaking concerning the appointment of commissions of enquiry, States should also bind themselves, in the same convention, to submit to the arbitration of the Permanent Court of International Justice any dispute not definitely closed by the report of the commission of enquiry.

The convention might also—and this would be even more advantageous—lay down that permanent commissioners should be appointed for a fixed period from lists of names which each contracting State would send to the Permanent Court of International Justice. When a case arose an international commission of enquiry would be immediately formed consisting of five commissioners, one appointed by each of the States concerned in the dispute, two other commissioners of other nationalities elected by the Court, and finally a fifth commissioner appointed by the four others.

Should a dispute arise, whatever the nature or form of that dispute might be, States would undertake to abstain from all coercive measures.

This method of acting as judge in one's own cause has indeed become incompatible with the organisation of modern international society. To resort to coercion would be tantamount to returning to primitive times when reparation was exacted by force.

The shock caused to the conscience of the world whenever coercive measures are employed in peace-time is sufficient to prove that the case of violence is no longer admitted in the present state of modern civilisation.

The international community as represented at Geneva in 1924 condemned acts of force and violence and placed them on a level with the crime of aggression in the Protocol on Arbitration, Security and Disarmament, which it drew up and which, when all is said and done, will remain the finest effort ever made in human history to ensure world peace. The official comment on Article 10, which determines the aggressor, reads as follows: "The text refers to resort to war, but it was understood during the discussion that, while mention was made of the most serious and striking instance, it was in accordance with the spirit of the Protocol that acts of violence and force, which possibly may not constitute an actual state of war, should nevertheless be taken into consideration

by the Council." This official comment was unanimously approved by the 1924 Assembly.

VI

*Conclusions*⁶

The conclusions we are about to draw are the logical outcome of the principles by which we have consistently been guided in preparing this report—and which we hold to be the only possible basis for the elaboration of rules likely to secure the approval of all States.

Were we to depart from these guiding rules, were we to seek to codify principles regarding which the collective will is uncertain or actually divided, our endeavours would be useless; indeed, we should be encouraging the establishment of a series of continental systems and codifications of law—which already exist in outline—the sole result being to create unending sources of disagreement.

We should not lose sight of the fact that the object of our task is to establish rules which may be embodied in international conventions, and that these conventions, to be effective, require the consent of all, or nearly all, the countries of the world.

These are our conclusions:

1. Since international responsibility can only arise out of a wrongful act, contrary to international law, committed by one State against another State, damage caused to a foreigner cannot involve international responsibility unless the State in which he resides has itself violated a duty contracted by treaty with the State of which the foreigner is a national, or a duty recognised by customary law in a clear and definite form.

2. The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

The recognised public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.

3. A State is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the State was bound under international law to perform and inflicted by an official within the limits of his competence, subject always to the following conditions:

- (a) If the right which has been infringed and which is recognised as belonging to the State of which the injured foreigner is a national is a positive right established by a treaty between the two States or by the customary law;

⁶As reproduced here, the conclusions of the report contain amendments made by M. Guerrero as a result of the discussion in the Committee of Experts.

(b) If the injury suffered does not arise from an act performed by the official for the defence of the rights of the State, except in the case of the existence of contrary treaty stipulations;

The State on whose behalf the official has acted cannot escape responsibility by pleading the inadequacy of its law.

4. The State is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an official acting outside his competence as defined by the national laws, except in the following cases:

(a) If the Government, having been informed that an official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;

(b) If, when the act has been committed, the Government does not with all due speed take such disciplinary measures and inflict such penalties on the said official as the laws of the country provide;

(c) If there are no means of legal recourse available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws.

5. Losses occasioned to foreigners by the acts of private individuals, whether they be nationals or strangers, do not involve the responsibility of the State.

6. The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.

It therefore follows:

(a) That a State has fulfilled its international duty as soon as the judicial authorities have given their decision, even if those authorities merely state that the petition, suit or appeal lodged by a foreigner is not admissible;

(b) That a judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the State.

7. On the other hand, however, a State is responsible for damage caused to foreigners when it is guilty of a *denial of justice*.

Denial of justice consists in refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them. A refusal of the competent judge to exercise jurisdiction also constitutes a *denial of justice*.

8. Damage suffered by foreigners in case of riot, revolution or civil war does not involve international responsibility for the State. In case of riot, however, the State would be responsible if the riot was directed against foreigners, as such, and the State failed to perform its duties of surveillance and repression.

9. The category of damage referred to in the preceding paragraph

does not include property belonging to strangers which has been seized or confiscated in time of war or revolution, either by the lawful Government or by the revolutionaries. In the first case the State is responsible, and in the second the State must place at the disposal of foreigners all necessary legal means to enable them to obtain effective compensation for the loss suffered and to enable them to take action against the offenders.

The State would become directly responsible for such damage if, by a general or individual amnesty, it deprived foreigners of the possibility of obtaining compensation.

10. All that has been said in regard to centralised States applies equally to federal States. Consequently, any international responsibility which may be incurred by one of the member States of a federation devolves upon the federal Government, which represents the federation from the international point of view; the federal Government may not plead that, under the constitution, the member States are independent or autonomous.

11. Any dispute which may arise between two States regarding damage suffered by foreigners within the territory of one of the States must be submitted to an international commission of enquiry appointed to examine the facts.

If the report of the commissioners adopted by a majority vote does not result in the incident being closed, the parties concerned must submit the dispute to decision by arbitration or some other means of pacific settlement.

12. States must formally undertake not to resort in the future to any measure of coercion until all the above-mentioned means have been exhausted.

(Signed) Gustavo GUERRERO,
Rapporteur.

APPENDIX II

Projects of conventions prepared at the request on January 2, 1924, of the Governing Board of the Pan-American Union for the consideration of the international Committee of Jurists and submitted by the American Institute of International Law to the Governing Board of the Pan-American Union, March 2, 1925.*

PROJECT No. 15

RESPONSIBILITY OF GOVERNMENTS

Whereas it is expedient to determine the responsibility of American Republics with regard to foreigners for damages for which they may suffer on the territory of these republics,

The latter have agreed to conclude the following convention:

Article 1

The government of each American Republic is obliged to maintain on its own territory the internal order and governmental stability indispensable to the fulfillment of international duties.

Article 2

As a consequence of the rule formulated in the preceding article, the governments of the American Republics are not responsible for damages suffered by foreigners, in their persons or in their property for any reason whatsoever, except when the said governments have not maintained order in the interior, have been negligent in the suppression of acts disturbing this order, or, finally, have not taken precautions so far as they were able to prevent the occurrence of such damages or injuries.

PROJECT No. 16

DIPLOMATIC PROTECTION

Whereas the cases in which diplomatic claims may be made are matters interesting them in a special manner,

The American Republics have concluded the following convention:

Article 1

The American Republics do not recognize in favor of foreigners other obligations or responsibilities than those established for their own nationals in their constitutions, their respective laws, and the treaties in force.

* *American Journal of International Law*, Vol. 20, Special Number, October, 1926, pp. 328-330.

Article 2

In accordance with the present convention, every American Republic has the right to accord diplomatic protection to its native or naturalized citizens.

The conditions under which an American Republic may grant diplomatic protection depend entirely on its internal legislation.

Article 3

Every nation has the right to accord diplomatic protection to its nationals in an American Republic in cases in which they do not have legal recourse to the authorities of the country, or if it can be proved that there has been denial of justice by the said authorities, undue delay, or violation of the principles of international law.

Article 4

Denial of justice exists—

(a) When the authorities of the country where the complaint is made interpose obstacles not authorized by law in the exercise by the foreigner of the rights which he claims;

(b) When the authorities of the country to which the foreigner has had recourse have disregarded his rights without legal reason, or for reasons contrary to the principles of law;

(c) When the fundamental rules of the procedure in force in the country have been violated and there is no further appeal possible.

Article 5

Every American Republic has the power to protect not only its own nationals but those of other countries when the latter have entrusted it with diplomatic representation or the supervision of their interests in the country where the claim is made.

Article 6

The American Republic to which the diplomatic claim is presented may decline to receive this claim when the person in whose behalf it is made has interfered in internal or foreign political affairs against the government to which the claim is made. The republic may also decline if the claimant has committed acts of hostility toward itself.

Article 7

A diplomatic claim is not admissible when the individual in whose behalf it is presented is at the same time considered a national by the law of the country to which the claim is made, in virtue of circumstances other than those of mere residence in the territory.

Article 8

In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented.

Article 9

Every American Republic has the right to accord diplomatic protection not only to its nationals but also to the companies, corporations, or other juridical persons who, according to its laws, are of the nationality of the country.

Article 10

American Republics are expressly forbidden to protect their nationals through diplomatic channels when the rights involved have been acquired by means of a voluntary or forced cession made subsequent to the act giving rise to the claim.

Article 11

All controversies arising between American Republics regarding the admissibility of a diplomatic claim under the present convention shall be determined by arbitration or by the decision of an international court when not settled by direct negotiation.

APPENDIX III

INSTITUT DE DROIT INTERNATIONAL*

Comité de Rédaction de la XIII^{ème} Commission
Procès-verbal du 31 Août, 1927

PROJET DE RESOLUTION

* * * * *

Article Premier

L'Etat est responsable des dommages qu'il cause aux étrangers par toute action ou omission contraire à ses obligations internationales, quelle que soit l'autorité de l'Etat dont elle procède: constituante, législative, gouvernementale ou judiciaire.—

Cette responsabilité de l'Etat existe même lorsque ses organes agissent contrairement à la loi ou à l'ordre d'une autorité supérieure.

Elle existe également lorsque ces organes ont agi en dehors de leur compétence, en se couvrant de leur qualité d'organes de l'Etat, et en se servant des moyens mis, à ce titre, à leur disposition.

Cette responsabilité de l'Etat n'existe pas si l'inobservation de l'obligation n'est pas la conséquence d'une faute de ses organes, à moins que, dans le cas dont il s'agit, une règle, conventionnelle ou coutumière, spéciale à la matière, n'admette la responsabilité sans faute.

Article 2

L'Etat est responsable du fait des collectivités qui exercent sur son territoire des fonctions publiques.

Article 3

L'Etat n'est responsable, en ce qui concerne les faits dommageables commis par des particuliers, que lorsque le dommage résulte du fait qu'il aurait omis des prendre les mesures auxquelles, d'après les circonstances, il convenait normalement de recourir pour prévenir ou réprimer de tels faits.

Article 4

Réserve faite des cas où le droit international appellerait un traitement de l'étranger préférable à celui du national, l'Etat doit appliquer aux étrangers, contre les faits dommageables émanant de particuliers, les mêmes

* The text which follows has not yet been published, and is taken from the mimeographed copy of the proceedings of the Institut.

mesures de protection qu'à ses nationaux. Les étrangers doivent en conséquence avoir au moins le même droit que ceux-ci à obtenir des indemnités.

Article 5

L'Etat est responsable du chef de déni de justice:

1. Lorsque les tribunaux nécessaires pour assurer la protection des étrangers n'existent ou ne fonctionnent pas.
2. Lorsque les tribunaux ne sont pas accessibles aux étrangers.
3. Lorsque les tribunaux n'offrent pas les garanties indispensables pour assurer une bonne justice.

Article 6

L'Etat est également responsable si la procédure ou le jugement constituent un manquement manifeste à la justice, notamment s'ils ont été inspirés par la malveillance à l'égard des étrangers, comme tels, ou comme ressortissants d'un Etat déterminé.

Article 7

L'Etat n'est responsable des dommages causés en cas d'attroupement, d'émeute, d'insurrection ou de guerre civile que s'il n'a pas cherché à prévenir les actes dommageables avec la diligence qu'il convient d'apporter normalement dans les mêmes circonstances, ou s'il n'a pas réagi avec la même diligence contre ces actes, ou s'il n'applique pas aux étrangers les mêmes mesures de protection qu'aux nationaux. Il est notamment obligé de mettre les étrangers au bénéfice des mêmes indemnités que ses nationaux, au regard des communes ou autres personnes. La responsabilité de l'Etat en raison d'actes commis par des insurgés, cesse lorsqu'il a reconnu ces derniers comme partie belligérante, et, en tous cas, à l'égard des Etats qui les ont reconnus comme tels.

Est réservée la question de savoir dans quelle mesure un Etat est responsable des actes des insurgés, même reconnus comme partie belligérante, au cas où ceux-ci sont devenus le gouvernement du pays.

Article 8

Les principes exposés aux articles 3 et 4 régissent aussi l'obligation internationale qui incombe à l'Etat de garantir les droits que les étrangers ont à son égard, en vertu de son droit interne.

Article 9

L'Etat fédéral est responsable de la manière d'agir des Etats particuliers, non seulement si elle est contraire à ses propres obligations, mais encore si elle l'est aux obligations internationales qui incomberaient à ces Etats. Il ne peut invoquer pour se soustraire à cette responsabilité le fait que sa constitution ne lui donne ni le droit de contrôle sur les Etats par-

ticuliers, ni le droit d'exiger d'eux qu'ils satisfassent à leurs obligations.

De même l'Etat protecteur est responsable de la manière d'agir de l'Etat protégé, en tant que ce dernier est tenu d'exécuter les obligations internationales de l'Etat protecteur, ou en tant que celui-ci représente l'Etat protégé vis-à-vis des Etats tiers, lésés par lui et usant de la faculté de faire valoir leurs réclamations.

Article 10

La responsabilité de l'Etat comprend la réparation des dommages soufferts, en tant qu'ils se présentent comme la conséquence de l'inobservation de l'obligation internationale. Elle comprend de plus, s'il y a lieu, selon les circonstances et d'après les principes généraux du droit des gens, une satisfaction à donner à l'Etat qui a été lésé dans la personne de ses ressortissants, sous la forme d'excuses plus ou moins solennelles et, dans les cas appropriés, par la punition, disciplinaire ou autre, des coupables.

Article 11

Le dédommagement comprend s'il y a lieu, une indemnité pour les personnes lésés, à titre de réparation des souffrances morales qu'elles ont éprouvées.

Lorsque la responsabilité de l'Etat résulte uniquement du fait qu'il n'a pas pris les mesures requises après l'accomplissement de l'acte dommageable, il n'est tenu qu'à la réparation du dommage résultant de omission totale de ces mesures.

L'Etat responsable de la conduite d'autres Etats est tenu de faire exécuter par eux les prestations que comporte cette responsabilité et qui dépendent d'eux; s'il est dans l'impossibilité de la faire, il est tenu d'accorder une compensation équivalente.

L'indemnité à accorder doit être mise en principe à la disposition de l'Etat lésé.

Sont réservées les questions relatives à l'évaluation des dommages intérêts et aux rapports des personnes lésées avec leur Etat et avec l'Etat contre lequel la réclamation a été formée.

Article 12

Aucune demande de réparation ne peut être introduite de la part de l'Etat aussi longtemps que l'individu lésé dispose de voies de recours efficaces et suffisantes pour le faire jouir du traitement qui lui est dû.

Aucune demande de réparation ne peut non plus avoir lieu si l'Etat responsable met à la disposition de l'individu lésé une voie de procédure efficace pour obtenir le dédommagement correspondant.

Voeu Final

L'Institut émet le voeu que par des conventions internationales, là où il n'en existe pas encore, les Etats s'engagent par avance à soumettre tous

différends concernant la responsabilité internationale de l'Etat résultant des dommages causés sur leur territoire à la personne et aux biens des étrangers, d'abord à une commission internationale d'enquête, si cela est nécessaire pour l'examen des faits; ensuite à une procédure de conciliation; enfin, si elle ne peut aboutir, à une procédure judiciaire devant la Cour Permanente d'Arbitrage, ou à la Cour Permanente de Justice Internationale, ou toute autre juridiction, pour une solution définitive.

L'Institut émet aussi le vœu que les Etats s'abstiennent de toute mesure coercitive avant d'avoir eu recours aux moyens qui précèdent.

APPENDIX IV

GENERAL INSTRUCTIONS FOR CLAIMANTS*

1. *General Statement.*—The great number and variety of international claims arising out of the recent war and the considerable difficulty heretofore experienced by the Department of State in obtaining adequate reports as to the nationality of claimants and the facts regarding their claims, have made it imperative, by the use of an Application form, to standardize the manner of reporting claims to the Department of State and to specify the particulars about which the Department desires to have information, in order that claims may be readily examined and classified and properly prepared for presentation to a foreign Government or to an Arbitration Commission or other tribunal.

2. The importance of carefully studying the instructions and questions in this Application, and of strict compliance with the requirements thereof, can not be too strongly emphasized. Errors or defects in the execution of this Application will necessitate its amendment or reexecution. A careful preparation of the answers to the questions in this Application pertaining to the particular case will simplify the presentation of data by claimants and facilitate the consideration of claims by the Department of State.

3. Claimants, whether individuals, partnerships, joint-stock companies, or corporations, who after carefully examining these instructions believe they have valid claims for pecuniary reparation against foreign Governments, in the settlement of which they desire the assistance of the Department of State, should fill out this Application and return it, signed and sworn, or affirmed, as indicated herein. Persons are cautioned against going to the expense and trouble of preparing claims against a foreign Government unless they are satisfied that they have at least a *prima facie* case, under the accepted rules of the law and practice of nations or under the provisions of international agreements. The Department of State can not undertake to pass upon the validity of a claim in advance of the submission of a duly executed Application, but claimants who have heretofore filed their claims in accordance with the "*Claims Circular*" of March 5, 1906, need not execute an Application for the same claims, unless requested to do so by the Department of State.

4. *International Claims.*—Claims presented by the Government of the United States against a foreign Government are based fundamentally,

* From "Application for the support of Claims against Foreign Governments," issued by the Department of State of the United States, May 15, 1919, Revised October 1, 1924. It is desirable that claims should be presented on forms furnished by the Department.

among other things, upon loss or injury (1) which was suffered by the United States or by its citizens or those entitled to its protection, and (2) for which a foreign Government, including its officials, branches, or agencies, was responsible. If either of these elements is lacking, the validity of the claim is doubtful, and, as a rule, the Government of the United States is not in a position to be of any assistance in obtaining reparation.

5. *Nationality of Claim.*—The Government of the United States can interpose effectively through diplomatic channels only on behalf of itself, or of claimants (1) who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes, or native peoples of the United States or its territories or possessions, etc.), or (2) who are otherwise entitled to American protection in certain cases (such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.). Unless, therefore, the claimant can bring himself within one of these classes of claimants, the Government can not undertake to present his claim to a foreign Government. For example, the declaration of intention to become a citizen of the United States is insufficient to establish the right to protection by the United States except in case of American seamen.

6. Moreover, the Government of the United States, as a rule, declines to support claims that have not belonged to claimants of one of these classes from the date the claim arose to the date of its settlement. Consequently, claims of foreigners who, *after* the claims accrued, became Americans or became entitled to American protection, or claims of Americans or persons entitled to American protection who, *after* the claims accrued, assumed foreign nationality or protection and lost their American nationality or right to American protection, or claims which Americans or persons entitled to American protection have received from aliens by assignment, purchase, succession, or otherwise, or *vice versa*, can not be espoused by the United States. For example, a claim for a loss or injury which occurred *before* the claimant obtained final naturalization as a citizen of the United States (except in case of an American seaman who has made a declaration of intention) will not, by reason of his subsequent naturalization, be supported by the United States.

7. Not all persons of American nationality, however, are entitled to the protection of the United States. Acts which have in the past been regarded as sufficient grounds for the Government to decline protection to Americans in particular cases are, among others, maintaining extended domicile in a foreign country, unneutral conduct, acceptance of office under a foreign Government, active participation in foreign politics, participation in filibustering or insurrectionary movements against a friendly foreign Government, seeking refuge from justice, and, generally, acts inconsistent with allegiance to the United States.

8. *Responsibility of Foreign Government.*—Unless the responsibility for the loss or injury for which reparation is claimed is attributable to a foreign Government, efforts of the Government of the United States on behalf of the claimant will be futile. It is essential, therefore, for claimants to show that the responsibility for their losses or injuries is attributable to an official, branch, or agency of a foreign Government. If any legal remedies for obtaining satisfaction for, or settlement of, the losses or injuries sustained are afforded by a foreign Government before its judicial or administrative tribunals, boards, or officials, interested persons must ordinarily have recourse to and exhaust proceedings before such tribunals, boards, or officials as may be established or designated by the foreign Government and open to claimants for the adjustment of their claims and disputes. After such remedies have been exhausted with the result of a denial of justice attributable to an official, branch, or agency of a foreign Government, or have been found inapplicable or inadequate, or if no legal remedies are afforded, the Department of State will examine the claim with a view to ascertaining whether, in all the circumstances of the case and considering the international relations of the United States, the claim may properly be presented for settlement through diplomatic channels, by arbitration or otherwise. Local remedies are provided generally in foreign countries for the settlement of *contract claims* founded upon *contracts* with the *Government or its agencies*, or of *private claims* for losses or injuries due to the acts of *private individuals*, and in some countries, for the settlement of claims based on the *tortious acts* of the Government or for the *malfeasance or misfeasance in office* of its officers. Local remedies, however, for the adjustment of claims growing out of *war*, are seldom provided, as their settlement is generally comprehended in the treaty of peace.

9. *Claims Against United States.*—Claims of American citizens against the Government of the United States are not generally within the cognizance of the Department of State. They are usually subjects for the consideration of some other department of the Government, or of the Court of Claims, or for an appeal to Congress. This Application form must not be used for such claims.

10. *Claims Against Private Persons.*—Claims against private persons, including partnerships, companies, and corporations, are not as a rule within the purview of the Department of State. They are generally matters for private adjustment or for determination in courts of justice. This Application form must not be used for such claims.

11. *Number of Copies.*—Each claimant should submit two identical copies of his Application properly filled out, signed, and sworn, or affirmed. *An identical set of documents should be attached to each Application.* It is important that a *third copy* of the Application and accompanying documents should be retained by the claimant for reference in connection with correspondence regarding his claim.

12. *Return of Papers.*—All papers filed with the Department of State by claimants in connection with the presentation of their claims become part of the permanent records of the Government, and, as a rule, may not thereafter be removed from the records for the use of claimants, or other interested persons, or for other purposes.

13. *Supplemental Statements.*—Any subsequent communications to the Department of State intended to supplement the answers or statements in this Application should be furnished in *duplicate* (a third copy being retained by the claimant), on paper as nearly as possible the size of this Application, typewritten on one side of the page. Such supplementary statements must be signed and sworn, or affirmed, in the same manner as this Application, and should identify the Application to which it is a supplement and refer by number to the question to which the supplemental matter relates, thus: "*Supplement to Application regarding claim of (name of claimant) against (name of country against which claim is made); Question (No.)*." In addition, claimants may, if they so desire, submit a brief in support of the validity of their claims.

14. *Evidence.*—Where evidence is called for in this Application, it is important that claimants should furnish the strongest evidence obtainable (*other than and in addition to statements or affidavits of the claimant*) and use the same care in the preparation and presentation of evidence as if the claim were to be subjected to the scrutiny of a court of justice; since the espousal of a claim by the United States will be conditioned in large measure upon the adequacy of the evidence submitted in support of the claim, and since the evidence may be laid before a foreign Government or an international tribunal for examination.

15. Documentary evidence may consist of naturalization papers, deeds, contracts, wills, letters of administration, letters testamentary, bills of sale, foreign laws, decrees or regulations, sequestration orders, birth, death, and marriage certificates, affidavits, manifests, invoices, bills of lading, ships papers, charter parties, insurance policies, receipts, letters, photographs, etc. Papers bearing signatures should be accompanied (*a*) by the addresses of the signers or (*b*) by a statement that they are deceased or (*c*) by a statement that their whereabouts is unknown and can not be ascertained, as the case may be. Since documents accompanying this Application become part of the permanent records of the Government, original documents need not in most cases be furnished, copies duly authenticated or verified, as indicated in paragraph 17, being sufficient. The original documents, however, may be subsequently called for by the Government.

16. All testimony must be set forth in writing upon oath or affirmation of the witness.

17. *Authentications and Verification.*—Public documents or records (whether originals or copies) exhibited in evidence should, if possible, be *authenticated* by the certificate of their official custodian or recorder or by the official who signed them. (For example of authentication, see

Appendix A, p. 18.) Private papers or documents (whether originals or copies) should, if possible, be *verified* as to their contents and signatures by the affidavit (see paragraph 19 below) of a person familiar with and competent to testify as to their verity, such as the person who issued or signed the documents or who saw them issued or signed and is familiar with their contents. (For example of verification, see Appendix B, p. 18.) *But verification may not be made by the magistrate or other person administering the oath, or by the claimant himself, unless the facts are within the exclusive knowledge of the claimant.*

18. *Translations.*—All testimony, papers, or documents in a foreign language which may be produced in evidence should be accompanied by a translation thereof in the English language *sworn to by the translator as a correct translation.* The requirements of paragraphs 15, 16, and 17 apply to all testimony, papers, or documents in a foreign language.

19. *Affidavits.*—Each affiant should state in his affidavit the following (for example of affidavit, see Appendix C, p. 19):

(a) His age, place of birth, nationality, residence, and occupation and where was his residence and what was his occupation at the time the events occurred in regard to which he testifies.

(b) Facts and circumstances showing that he is familiar with, and competent to testify about, the matters to which his affidavit relates.

(c) Whether he has any interest, direct or indirect, and if so what interest, in the claim and if he has any contingent interest therein, to what extent and upon the happening of what event he will be entitled to share in any indemnification which may be received in settlement of the claim.

(d) Whether he is the agent, attorney, or relative (and if a relative what relation) of the claimant, or of any person having an interest in the claim.

20. *Oaths (Affirmations).*—The oath (affirmation) to a document or paper filed with this Application should meet the following requirements (for example of oath (affirmation), see Appendix C, p. 19):

(a) The oath (affirmation) should be duly administered according to the laws of the place where it is taken by a magistrate or other person competent by such laws to administer oaths, having no interest in the claim to which the evidence relates and not being the agent or attorney of any person having such interest, and *it must be certified by him that such is the case.* An oath (affirmation) may be taken outside of the United States before a diplomatic or consular officer, or any other officer of the United States authorized to administer oaths by the laws of the United States, having no interest and not being the agent or attorney of any person having an interest in the claim, and *it must be certified by him that such is the case.* If the magistrate, officer, or other person administering the oath is a relative of any person having an interest in the claim, the degree of relationship must also be certified by the person administering the oath.

(b) In all cases the authority of the magistrate or other person to administer the oath (affirmation) (whether outside or within the United States) must be certified, unless that person be a notary public, or a diplomatic, consular, or other officer having a seal of office, in which case an impression of the seal will be sufficient certification.

21. *Action by the Department of State.*—This Application form has been prepared for the assistance and guidance of prospective claimants, and is not to be understood from its contents as committing the Department of State to take any action with respect to claims filed in accordance with its requirements. The Department will, however, consider the claims on their merits and will take such action, if any, as may be deemed appropriate and opportune, considering the foreign relations of the United States and the circumstances of the case. The assistance of the Department of State with respect to claims has been withdrawn or refused in particular cases on account of the speculative, exaggerated, or exorbitant amount of the claim, the discovery of fraud, collusion, misrepresentation, or illegal transactions, the refusal to produce proper evidence, and generally when the claim is contrary to public policy or international law.

22. *False Oaths.*—In order to avoid being put in the position of presenting to foreign Governments claims which are unfounded in fact or law, the Department of State desires to emphasize the solemnity attached to the full and frank execution of this Application in accordance with the requirements set forth herein, and to announce that the making of false statements in this Application or in connection therewith, pertaining, as they may, to the diplomatic relations of the United States with foreign countries, may result in the institution of legal proceedings, or in the withdrawal of the Government's assistance and support in connection with the settlement of the claim.

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VITA

Clyde Eagleton was born in Sherman, Texas, May 13, 1891, the son of Davis Foute Eagleton and Addie Christian Parker Eagleton. He was educated in the Sherman Public Schools, and received the B.A. degree in 1910, and the M.A. degree, as holder of the Stephen F. Austin Fellowship in History, in 1911, at Austin College, Sherman, Texas. He taught in the Mt. Pleasant, Texas, and the Wagoner, Oklahoma, High Schools; and proceeded to the M.A. degree at Princeton University in 1914. Chosen Rhodes Scholar from Oklahoma in 1914, he received the B.A. degree from Oxford University in 1917, winning while at Oxford the Robert Herbert Memorial Essay Prize in History. He taught at Cleburne, Texas, High School, 1915-1916; at Daniel Baker College, Brownwood, Texas, 1917-1918; at the University of Louisville, 1918-1919; was Associate Professor of History at Southern Methodist University, Dallas, Texas, 1919-1923; part-time instructor at Washington Square College, New York University, 1923-1925; Assistant Professor of Government at the same place, 1925—. He was registered for the degree of Doctor of Philosophy in Columbia University in 1923; took courses under Professors Duggan, Moon, Hayes, Moore, and Parkinson; and worked upon his dissertation under the guidance of Mr. Julius Goebel, Jr., Professors John Bassett Moore, J. P. Chamberlain, and C. C. Hyde.

He has contributed articles and reviews for the *Texas Review*, the *Southwest Review*, the *American Review*, *Current History Magazine*, the *American Journal of International Law*, the *Michigan Law Review*, the *Political Science Quarterly*, the *New York World*. He was invited as a member of the Conference of Teachers of International Law at Washington, 1925; and of the European Conference of American Professors of International Relations, 1926.

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